Supreme Court, U.S.
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October 1, 2008 Term

No.

In The Supreme Court of the United States of America

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY
Petitioner,

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA,
GENERAL COURT OF JUSTICE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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DECEMBER 19, 2008

Petitioner, Pro Se

THE QUESTIONS PRESENTED FOR REVIEW

Petitioner presents five questions for review by the Supreme Court of the United States as to whether the due process and equal protection rights of Petitioner as guaranteed by the Fourteenth Amendment of the United States, U.S. Const. Amend XIV, were violated by the following:

(i) The suspension of discovery and the hearing of Respondent's Motion for Summary Judgment before the close of evidence;

(ii) The failure of the North Carolina Industrial Commission and the General Court of Justice of North Carolina to provide relief by injunction and intervention to prevent Respondent from destroying evidence relevant to these proceedings during the pendency of these proceedings, and the subsequent destruction of evidence relevant to these proceedings during the pendency of these proceedings;

(iii) The failure of the North Carolina Industrial Commission and the General Court of Justice of North Carolina to adjudicate the objections of Petitioner as to the genuine issues of material fact and triable issues of fact as to the time, place, circumstance and nature of the personal injury of Petitioner in question presented at the hearing for Respondent's Motion for Summary Judgment;

(iv) The opinion, decision and dismissal classifying Petitioner as subject to the exclusive remedies of the North Carolina Workers' Compensation Act without validation or certification that the personal injury of Petitioner qualified for such remedies; and

(v) The opinion, decision and dismissal eliminating Petitioner's common law claim for civil remedy against his employer, Respondent, pursuant to the exclusivity provisions of the North Carolina Workers' Compensation Act, without adjudicating if the North Carolina Workers' Compensation Act provided an effective administrative remedy.

PARTIES TO THIS PROCEEDING

Petitioner in this matter is J. Kamau Christopher a/k/a Joseph Kamau Christopher Bey, represented *Pro Se.*

Respondent Courts in this matter are the Supreme Court of North Carolina, General Court of Justice of North Carolina; the Court of Appeals of North Carolina, General Court of Justice of North Carolina; and the North Carolina Industrial Commission, North Carolina Department of Commerce.

Respondent in this matter is the State of North Carolina; The Government of the State of North Carolina; Michael F. Easley, In His Official Capacity as the Governor of the State of North Carolina, Principle Executive Officer of the Executive Branch of the Government of the State of North Carolina; and other duly authorized officers, agents and employees of the Government of the State of North Carolina acting in their official capacity in the scope of their employment as public servants; The University of North Carolina; Erskine B. Bowles, In His Official Capacity as President, Principle Executive Officer of the General Administration of the University of North Carolina; and other duly authorized officers, agents and employees of the University of North Carolina acting in their official capacity in the scope of their employment as public servants; North Carolina State University, constituent institution of the University of North Carolina; James L. Oblinger, In His Official Capacity as the Chancellor, Principle Executive Officer of North Carolina State University; Marye Anne Fox,

In Her Official Capacity as the former Chancellor, Principle Executive Officer of North Carolina State University; Charles Leffler, in His Official Capacity as Vice Chancellor for Finance and Business, Office of Finance and Business, North Carolina State University; Kevin J. MacNaughton, in His Official Capacity as Associate Vice Chancellor for Facilities, Division of Facilities, Office of Finance and Business, North Carolina State University; Bruce L. MacDonald, in His Official Capacity as Health & Safety Manager, Environmental Health & Safety Center, North Carolina State University; Thomas H. Stafford. in His Official Capacity as Vice Chancellor for Student Affairs, Office of Student Affairs, North Carolina State University; Timothy Luckadoo, Ph.D., in His Official Capacity as Associate Vice Chancellor for University Housing, University Housing, Office of Student Affairs, North Carolina State University; Susan Grant, Director of University Housing, University Housing, North Carolina State University; Gary Thompson, in His Official Capacity as former Assistant Director of Facility Operations, University Housing, and former Associate Director of Facility Operations, University Housing, Office of Student Affairs, North Carolina State University; Timothy Blair, in His Official Capacity as former Assistant Director for Avent Ferry Complex and Wood Hall, East Campus, former Associate Director of East Campus, current Associate Director of University Apartments, University Housing, Office of Student Affairs, North Carolina State University; and other duly authorized officers, agents and employees of the North Carolina State University acting in their official capacity in the scope of their employment as public servants.

Counsel for the Respondent is Dahr Joseph Tanoury, Esq., Assistant Attorney General, Tort Claims Section, Office of the Attorney General of the State of North Carolina; Elizabeth W. Riley, Esq., Deputy Legal Counsel, Office of Legal Counsel, Office of the Governor of the State of North Carolina; Laura Bernstein Luger, Esq., Vice President and General Counsel, The University of North Carolina System General Administration; David T. Drooz, Senior Associate General Counsel, Office of Legal Affairs, North Carolina State University.

Note: In the original affidavit of tort claim, which initiated this action, Respondent was cited as North Carolina State University, with statutory reference to negligent acts performed by officers, agents and/or employees of Respondent in their official capacity as public servants. See N.C. Gen. Stat. § 143-291 et seq. Pursuant to the controlling law and statutory authority, the executive authority of Respondent is exclusively vested in the Governor of the State of North Carolina and derives from the Constitution of the State of North Carolina, and controlling law and legal authority for the public entity of North Carolina State University designates Respondent as subject to executive authority and a constituent institution of the University of North Carolina. See N.C. Const. art. IX, § 8; N.C. Gen. Stat. § 116-1 et seq.

TABLE OF CONTENTS

Section	Page
Questions presented for review	i
Parties to this Proceeding	iii
Table of Contents	vi
Table of Authorities	xi
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of Case	3
I. Summary of Federal Question	3
II. Statutory Background	6
III. Factual Background	17
IV. Procedural History	22

Table of Contents – Continued:

Justification for Grant of This Writ 28

I. Petitioner duly, timely and properly presented a federal question in these proceedings and the federal question was maintained throughout these proceedings to the state court of last resort..... 28

II. The North Carolina Supreme Court passed on this federal question 30

III. This Court has an independent jurisdiction to review this matter on appeal and should grant this Writ 32

Conclusion 34

INDEX TO APPENDICES

Appendix Page

Appendix A: *Christopher v. N.C. State Univ.*, No. TA-19383, Or. (N.C. Industrial Commission 9 February 2007) 1a

Appendix B: *Christopher v. N.C. State Univ.*, No. TA-19383, Or. (N.C. Industrial Commission 10 August 2007) 7a

Index to Appendices – Continued:

Appendix C: *Christopher v. N.C. State Univ.*, No. P07-907, Or. (N.C. Ct. App. 14 November 2007) 14a

Appendix D: *Christopher v. N.C. State Univ.*, No. COA07-1516, slip op. (N.C. Ct. App. 20 May 2008) 16a

Appendix E: *Christopher v. N.C. State Univ.*, No. 246-P08, Orders (N.C. S. Ct. 4 September 2008) 23a

Appendix: F: *Christopher v. N.C. State Univ.*, No. COA07-1516, Petitioner's Record on Appeal (N.C. Ct. App. 14 December 2007) (excerpts therefrom) 26a

Appendix G: *Christopher v. N.C. State Univ.*, No. COA07-1516, Plaintiff-Appellant's Appeal Information Statement and Brief in Support of Appeal (N.C. Ct. App. 28 December 2007) 44a

Appendix H: *Christopher v. N.C. State Univ.*, No. COA07-1516, Defendant-Appellee's Reply Brief (N.C. Ct. App. 27 February 2008) 77a

Appendix I: *Christopher v. N.C. State Univ.*, No. COA07-1516, Plaintiff-Appellant's Reply Brief (N.C. Ct. App. 7 March 2008) ... 89a

Index to Appendices – Continued:

Appendix J: *Christopher v. N.C. State Univ.*, No. COA07-1516, Order allowing Plaintiff-Appellant to submit Reply Brief (N.C. Ct. App. 10 March 2008) 100a

Appendix K: *Christopher v. N.C. State Univ.*, No. 246-P08, Plaintiff-Appellant's Notice of Appeal, Petition for Discretionary Review and Petition for Writ of Supersedeas (N.C. S. Ct. 30 May 2008) 102a

Appendix L: *Christopher v. N.C. State Univ.*, No. 246-P08, Defendant-Appellee's Response and Motion to Dismiss Appeal (N.C. S. Ct. 11 June 2008) 135a

Appendix M: North Carolina State University Facility Profile and Ten-Year Capital Plan, published by Eva Klein & Associates, December 1999 (excerpts therefrom) 145a

Appendix N: Administrative Memorandum prepared by Petitioner, as employee, and submitted to Respondent, as employer, dated October 8, 2002 (redacted as appropriate) 151a

Appendix O: Letter from Respondent to Petitioner of January 23, 2004 ..... 154a

Index to Appendices – Continued:

Appendix P: Letter from Respondent to Petitioner of July 24, 2008 ..... 156a

Appendix Q: Letters from Respondent to Petitioner of August 15, 2008 and August 18, 2008 ..... 161a

Appendix R: Letters from Respondent to Petitioner of September 2, 2008 and September 3, 2008 ..... 165a

Appendix S: Letters from Respondent to Petitioner of September 24, 2008 and September 30, 2008 ..... 167a

Final page of Appendix S is page 177a

TABLE OF CITED AUTHORITIES

Cases:	Page
Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997)	32
Arizona Employers' Liability Cases, 250 U.S. 400, 39 S. Ct. 553, 63 L. Ed. 1058 (1919)	8
Arthur v. E.I. Dupont de Nemours & Co., 58 F.3d 121 (4th Cir. 1995)	15
Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994)	14
Beauchamp v. Dow Chemical Co., 427 Mich. 1; 398 N.W.2d 882 (1986)	11
Bias v. Eastern Associated Coal Corp., 220 W. Va. 190; 640 S.E.2d 540 (2006)	12
Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152; 412 N.E.2d 934; 432 N.Y.S.2d 879 (1980)	11
Birklid v. The Boeing Co., 127 Wn.2d 853; 904 P.2d 278 (1995)	12
Blailock v. O'Bannon, 795 So. 2d 533 (Miss. 2001)	12
Brady v. Safety-Kleen Corp., 61 Ohio St. 3d 624; 576 N.E.2d 722 (1991)	13
Brown v. Motor Inns of Carolina, Inc., 47 N.C. App. 115, 266 S.E.2d 848 (1980), cert. denied, 301 N.C. 86 (1980)	3, 8, 16

Cases – Continued:

Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964) 9

Burgess v. Seligman, 107 U.S. 20, 2 S. Ct. 10, 27 L. Ed. 359 (1882) 31

Burns v. Smith, 214 S.W.3d 335 (Mo. 2007) 12

Busby v. Truswal Systems Corp., 551 So. 2d 322 (Ala.1989) 13

Byrd v. Richardson-Greenshields Secur., Inc., 552 So. 2d 1099 (Fla. 1989) 14

Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416 (2004) 16

Cianci v. Nationwide Ins. Co., 659 A.2d 662 (R.I. 1995) 10

City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432; 105 S. Ct. 3249; 87 L. Ed. 2d 313 (1985) ... 33

Clayton v. Pizza Hut, Inc., 673 S.W.2d 144 (Tenn. 1984) 14

Cole v. Chandler, 2000 ME 104, 752 A.2d 1189 (2000) 10

Cole v. Dep't of Public Safety & Corr., 825 So. 2d 1134 (La. 2002) 11

Coleman v. American Universal Ins. Co., 86 Wis. 2d 615; 273 N.W.2d 220 (1979) 12

Connolly v. Maryland Casualty Co., 849 F.2d 525 (11th Cir. 1988) 15

Cases – Continued:

Conway v. Circus Circus Casinos, Inc., 116 Nev. 870; 8 P.3d 837 (2000) 10

Cook v. Moffat & Curtis, 46 U.S. 295, 12 L. Ed. 159 (1847) 31

Cooper v. Newell, 173 U.S. 555, 19 S. Ct. 506, 43 L. Ed. 808 (1899) 33

Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923) 8

Delgado v. Phelps Dodge Chino, Inc., 131 N.M. 272; 2001 NMSC 34; 34 P.3d 1148 (2001) 12

DeOliveira v. Liberty Mut. Ins. Co., 273 Conn. 487; 870 A.2d 1066 (2005) 11

Doe v. Purity Supreme, 422 Mass. 563; 664 N.E.2d 815 (1996) 13

Dolbrow v. Holland Indus., Inc., 64 N.C. App. 695, 308 S.E.2d 335 (1983) 9

Duggins v. N.C. State Bd. of CPA Examiners, 294 N.C. 120, 240 S.E.2d 406 (1978) 30

Dunlavey v. Economy Fire & Casualty Co., 887 F.2d 893 (8th Cir., 1989) 5

Dunn v. Peabody Coal Co., 855 F.2d 426 (7th Cir. 1988) 15

El Paso & S. R. Co. v. Eichel & Weikel, 226 U.S. 590, 33 S. Ct. 179, 57 L. Ed. 369 (1913) 32

Cases – Continued:

Errand v. Cascase Steel Rolling Mills, 320 Ore. 509; 888 P.2d 544 (1995) 14

Etimani v. Samoa Packing Co., 19 A.S.R.2d 1 (1991) 10

Fender v. G.E. Co., 260 F. Supp. 75 (W.D.N.C. 1966) 9

Fender v. G.E. Co., 380 F.2d 150 (4th Cir. 1967) 9

Fenner v. Municipality of Anchorage, 53 P.3d 573 (Alaska 2002) 11

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940) 31

Ford v. Revlon, Inc., 153 Ariz. 38; 734 P.2d 580 (1987) 11

Forrester v. White, 484 U.S. 219; 108 S. Ct. 538; 98 L. Ed. 2d 555 (1988) 14

Freeman v. SCM Corp., 311 N.C. 294, 316 S.E.2d 81 (1984) 9

Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977) 9

Gantt v. Sec., USA, Inc., 356 F.3d 547 (4th Cir. 2004) 15

Gourley v. Crossett Pub. Sch., 333 Ark. 178; 968 S.W.2d 56 (1998) 11

Great Southern Fire Proof Hotel Co. v. Jones, 193 U.S. 532, 24 S. Ct. 576, 48 L. Ed. 778 (1904) 31

Cases – Continued:

Grillo v. National Bank of Washington, 540 A.2d 743 (D.C. 1988) 11

Gross v. United States Mortg. Co., 108 U.S. 477, 2 S. Ct. 940, 27 L. Ed. 795 (1883) 32

Guzman-Cotto v. E.L.A., 156 D.P.R. 693; 2002 TSPR 59 (2002) 12

Harden v. Thomasville Furn. Co., 199 N.C. 733, 155 S.E. 728 (1930) 9

Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967) 9

Hayes v. Aetna Fire Underwriters, 187 Mont. 148; 609 P.2d 257 (Mont. 1980) 12

Heath v. Workers' Comp. Appeal Bd., 580 Pa. 174; 860 A.2d 25 (2004) 13

Heavner v. Town of Lincolnton, 202 N.C. 400, 162 S.E. 909, appeal dismissed, 287 U.S. 672, 77 L. Ed. 579, 53 S. Ct. 4 (1932) 8

Hildebrandt v. Whirlpool Corp., 364 N.W.2d 394 (Minn. 1985) 11

Hirase-Doi v. U.S. West Communs., Inc., 61 F.3d 777 (10th Cir. 1995) 14

Hollman v. Liberty Mut. Ins. Co., 712 F.2d 1259 (8th Cir. 1983) 15

Horne v. G.E. Co., 716 F.2d 253 (4th Cir. 1983) 9

Horodyskyj v. Karanian, 32 P.3d 470 (Colo. 2001) 13

Cases – Continued:

Iddings v. Mee-Lee, 82 Haw. 1; 919 P.2d 263 (1996) 11

Ihm v. Crawford & Co., 254 Neb. 818, 580 N.W.2d 115 (1998) 10

In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989) 22

In re Assessment of Use Taxes Against Village Publishing Corp., 312 N.C. 211, 322 S.E.2d 155 (1984) appeal dismissed, 472 U.S. 1001, 86 L. Ed. 2d 710, 105 S. Ct. 2693 (1985) 30

In re Certification of Question of Law from United States Dist. Court, 399 N.W.2d 320 (S.D. 1987) 12

Jackson v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985) 9

Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 35 S. Ct. 167, 59 L. Ed. 364 (1915) 7

Jensen v. County of Santa Clara, 69 F.3d 544 (9th Cir. 1995) 15

Johnson and Smith v. First Union Corporation, 128 N.C. App. 450, 496 S.E.2d 1 (1998), *cert. denied*, 351 N.C. 648; 543 S.E.2d 870 (2000) 3, 8, 16

Cases – Continued:

Johnson v. BP Chems., Inc., 85 Ohio St. 3d 298; 1999 Ohio 267; 707 N.E.2d 1107 (1999) 13

Jones v. Martin Elecs., Inc., 932 So. 2d 1100 (Fla. 2006) 14

Karch v. Baybank FSB, 147 N.H. 525; 794 A.2d 763 (2002) 12

Kearney v. Denker, 114 Idaho 755; 760 P.2d 1171 (1988) 14

King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 48 S. Ct. 489, 72 L. Ed. 801 (1928) 31

Kuhn v. Fairmont Coal Co., 215 U.S. 349, 30 S. Ct. 140, 54 L. Ed. 228 (1910) 31

Kuhnert v. John Morrell & Co. Meat Packing, 5 F.3d 303 (8th Cir. 1993) 15

Larroquette v. Cardinal Health 200, Inc., 466 F.3d 373 (5th Cir. 2006) 15

Lerner v. Casey, 357 U.S. 468, 78 S. Ct. 1311, 2 L. Ed. 2d 1423 (1958) 32

Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964) 9

Loving v. Virginia, 388 U.S. 1; 87 S. Ct. 1817; 18 L. Ed. 2d 1010 (1967) 33

Lower Vein Coal Co. v. Industrial Board of Indiana, 255 U.S. 144, 41 S. Ct. 252, 65 L. Ed. 555 (1921) 8

Cases – Continued:

Lytle v. Ark., 63 U.S. 193, 16 L. Ed. 306 (1859) 32

Massey v. Board of Educ., 204 N.C. 193, 167 S.E. 695 (1933) 9

Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999) 9

McLaughlin et al. v. Florida, 379 U.S. 184; 85 S. Ct. 283; 13 L. Ed. 2d 222 (1964) 33

McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934) 9

McSwain v. Shei, 304 S.C. 25; 402 S.E.2d 890 (1991) 12

Mead v. Western Slate, Inc., 2004 VT 11, 176 Vt. 274, 848 A.2d 257 (2004) 12

Meerbrey v. Marshall Field & Co., 139 Ill. 2d 455; 564 N.E.2d 1222 (1990) 11

Middlekauff v. Allstate Ins. Co., 247 Va. 150; 439 S.E.2d 394 (1994) 12

Middleton v. Texas Power & Light Co., 249 U.S. 152, 39 S. Ct. 227, 63 L. Ed. 527 (1919) 8

Millison v. E. I. Du Pont de Nemours & Co., 101 N.J. 161; 501 A.2d 505 (1985) 12

Moore v. Envtl. Constr. Corp., 147 S.W.3d 13; (Kentucky 2004) 11

Cases – Continued:

Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917) 8

Mounteer v. Utah Power & Light Co., 823 P.2d 1055; 176 Utah Adv. Rep. 11 (1991) .. 12

Mullins v. Biglane Operating Co., 778 F.2d 277 (5th Cir. 1985) 15

National Exchange Bank v. Wiley, 195 U.S. 257, 25 S. Ct. 70, 49 L. Ed. 184 (1904) 33

Nelson v. Winnebago Indus., 619 N.W.2d 385 (Iowa 2000) 11

New York C. R. Co. v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917) 3, 8, 10, 34

Nez v. Peabody Western Coal Co., Inc., 7 Nav. R. 416 (1999) 10

North Carolina State Board of Education et al. v. Swann et al., 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971) 33

Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985) 9

Parker v. Energy Dev. Co., 691 P.2d 981 (Wyo. 1984) 13

Parret v. Unicco Serv. Co., 2005 OK 54; 127 P.3d 572 (2005) 12

Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) 15

Cases – Continued:

Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964) 9

Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657 (6th Cir. 2005) 15

Potts v. Uap-Ga Ag Chem, 270 Ga. 14; 506 S.E.2d 101 (1998) 14

Powe v. Odell, 312 N.C. 410, 322 S.E.2d 7624 (1984) 30

Powers v. Robeson County Memorial Hospital, Inc., 242 N.C. 290, 87 S.E.2d 510 (1955) 10

Pyle v. Dow Chemical Co., 728 F.2d 1129 (8th Cir. 1984) 15

Rafferty v. Hartman Walsh Painting Co., 760 A.2d 157 (Del. 2000) 13

Richardson v. North Carolina Dept. of Correction, 345 N.C. 128, 478 S.E.2d 501 (1996) 8, 16

Robles v. Hovensa, L.L.C., No. 2007/28, V.I. Sup., 49 V.I. 491 (2008) 12

Rodriguez v. Naylor Industries, Inc., 763 S.W.2d 411 (Tex. 1989) 11

Ruffin v. Compass Group USA, 150 N.C. App. 480, 563 S.E.2d 633 (2002) 9

Rutledge v. Tultex Corp., 308 N.C. 85, 93-4, 301 S.E.2d 359, 365 (1983) 8

Cases – Continued:

Ryles v. Durham County Hospital Corporation, Inc.; 107 N.C. App. 455; 420 S.E.2d 406 (1992) 16

Santos v. Public Sch. Sys., 2002 MP 12; 6 N.M.I. 422 (2002) 10

Smith v. GMC, 172 Fed. Appx. 661 (6th Cir. 2006) 15

State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994) 30

Staub v. City of Baxley, 355 U.S. 313; 78 S. Ct. 277; 2 L. Ed. 2d 302 (1958) 33

Stemple v. Md. Cas. Co., 282 Kan. 405; 144 P.3d 1273 (2006) 11

Subbe-Hirt v. Baccigalupi, 94 F.3d 111 (3rd Cir. 1996) 15

Tippmann v. Hensler, 716 N.E.2d 372 (Indiana 1999) 11

Union Mut. Life Ins. Co. v. Kirchoff, 169 U.S. 103, 18 S. Ct. 260, 42 L. Ed. 677 (1898) 32

United States v. Cruikshank et al., 92 U.S. 542, 23 L. Ed. 588 (1876) 33

United States v. Scotland Neck City Board of Education et al., 407 U.S. 484; 92 S. Ct. 2214, 33 L. Ed. 2d 75 (1972) 33

Cases – Continued:

Vacanti v. State Comp. Insurance Fund, 24 Cal. 4th 800, 14 P.3d 234, 102 Cal. Rptr. 2d 562 (2001) 11

Valencia v. Freeland & Lemm Constr. Co., 108 S.W.3d 239; (Tenn. 2003) 12

Van Fossen v. Babcock & Wilcox Co., 36 Ohio St. 3d 100; 522 N.E.2d 489 (1988) 13

Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971) 9

Ward & Gow v. Krinsky, 259 U.S. 503, 42 S. Ct. 529, 66 L. Ed. 1033 (1922) 8

Whitaker v. Town of Scotland Neck, 357 N.C. 552, 597 S.E.2d 665 (2003) 9

White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983) 30

Wilent v. FMC Corp., 129 F.3d 118 (4th Cir. 1997 16

Wilson v. Asten-Hill Mfg. Co., 791 F.2d 30 (3rd Cir. 1986) 15

Wolfe v. Yudichak, 153 Vt. 235; 571 A.2d 592 (1989) 14

Wood v. Guam Power Auth., 2000 Guam 18 (2000) 12

Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991) 9

Worthen v. Kennecott Corp., 780 F.2d 856 (10th Cir. 1985) 15

Cases – Continued:

Wright v. Wilson Mem. Hosp., 30 N.C. App. 91, 226 S.E.2d 225 (1976) 9

Yazoo & M. V. R. Co. v. Adams, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901) 31

Young v. Hartford Acci. & Indem. Co., 303 Md. 182, 492 A.2d 1270 (1985) 11

Zimmerman v. Valdak Corp., 1997 ND 203; 570 N.W.2d 204 (1997) 12

Constiutional Provisions, Statutes and Rules:

A.S.C.A. §§ 32.0501 et seq. 7
Ala. Code § 25-5-1 et seq. 6
Alaska Stat. § 23.30.001 et seq. 6
Ariz. Rev. Stat. § 23-901 et seq. 6
Ark. Code Ann. § 11-9-101 et seq. 6
Cal. Lab. Code Ann. § 3200 et seq. 6
Colo. Rev. Stat. § 8-40-101 et seq. 6
Conn. Gen. Stat. § 31-291 et seq. 6
D.C. Code Ann. § 32-1501 et seq. 6
Del. Code Ann., Tit. 19,§ 2301 et seq. 6
Fla. Stat. § 440.01 et seq. 6
Ga. Code Ann. § 34-9-1 et seq. 6
Guam Code Ann., Tit. 22, § 9101 et seq. ... 7
Haw. Rev. Stat. § 386-1 et seq. 6
Idaho Code § 72-101 et seq. 6
Ill. Stat. Ann. 820, § 305/1 et seq. 6
Ind. Code Ann. § 22-3-1-1 et seq. 6
Iowa Code Ann. § 85.1 et seq. 6
Kan. Stat. Ann. § 44-501 et seq. 6
Ky. Rev. Stat. Ann. § 342.001 et seq. 6
La. Rev. Stat. Ann. § 23:1021 et seq. 6
Mass Gen. Laws c. 152, § 1 et seq. 6

Constitutional Provisions, etc. – Continued:

Md. Code Ann., Lab. & Empl., § 9-101 et seq. 6

Me. Rev. Stat., Tit. 39-A, § 101 et seq. 6

Mich. Comp. Laws Ann. § 418.101 et seq. 6

Minn. Stat. Ann. § 176.0001 et seq. 6

Miss. Code Ann. § 71-3-1 et seq. 6

Mo. Rev. Stat. § 287.010 et seq. 6

Mont. Code Ann. § 39-71-101 et seq. 6

N. Mar. I. Code, Tit. 4, § 9329 et seq. 7

N.C. Const. art. I, § 5 29

N.C. Const., art. I, § 6 22

N.C. Const. art. I, § 18 29

N.C. Const. art. I, § 19 29

N.C. Const. art. III, § 1 22

N.C. Const. art. III, § 11 22

N.C. Const. art. IV 27

N.C. Const., art. IV, § 1 22

N.C. Const. art. IV, § 3 22

N.C. Const. art. IX, § 8 v

N.C. Gen. Stat. § 7A-1 et seq. 22

N.C. Gen. Stat. § 7A-25 27

N.C. Gen. Stat. § 7A-26 27

N.C. Gen. Stat. § 7A-29 25

N.C. Gen. Stat. § 7A-30 27

Constitutional Provisions, etc. – Continued:

N.C. Gen. Stat. § 7A-31 27
N.C. Gen. Stat. § 7A-32 ..... 25, 27
N.C. Gen. Stat. § 97.1 et seq. .....
..... ii, 3, 4, 7, 8, 16, 22, 24, 29, 34
N.C. Gen. Stat. § 97-10.1 et seq. 4, 22, 24
N.C. Gen. Stat. § 97-77 22
N.C. Gen. Stat. § 116-1 et seq. v
N.C. Gen. Stat. § 143-291 et seq. ..... v, 22
N.C. Gen. Stat. § 143B-1 et seq. 22
N.D. Cent. Code, § 65-01-01 et seq. 7
N.H. Rev. Stat. § 281-A:1 et seq. 7
N.J. Stat. Ann. § 34:15-1 et seq. 7
N.M. Stat. Ann. § 52-1-1 et seq. 7
N.N.C.A., Tit. 15, § 1001 et seq. 7
N.Y. Workers' Comp. Law § 1 et seq. 7
Neb. Rev. Stat. § 48-101 et seq. 6
Nev. Rev. Stat. Ann. § 616.010 et seq. 7
Ohio Rev. Code Ann. § 4123.01 et seq. 7
Okla. Stat., Tit. 85, § 1 et seq. 7
Or. Rev. Stat. § 656.001 et seq. 7
P.R. Laws Ann., Tit. 11, § 1 et seq. 7
Pa. Stat. Ann., Tit. 77, § 1 et seq. 7
R.I. Gen. Laws § 28-29-1 et seq. 7

Constitutional Provisions, etc. – Continued:

S.C. Code Ann. § 42-1-10 et seq. 7
S.D. Codified Laws § 62-1-1 et seq. 7
Tenn. Code Ann. § 50-6-101 et seq. 7
Tex. Lab. Code Ann. § 401.001 et seq. 7
5 U.S.C. § 8101 et seq. 7
28 U.S.C. § 1257 ..... 1, 2, 32
28 U.S.C. § 1651 ..... 1, 2
30 U.S.C. § 901 et seq. 7
33 U.S.C. § 901 et seq. 7
42 U.S.C. § 7384 et seq. 7
45 U.S.C. § 51 et seq. 7
U.S. Const. amend. V 29
U.S. Const. amend. VII 29
U.S. Const. amend. XIV § 1 ..... i, 3, 4, 26, 29
U.S. Const. art. III 2
Utah Code Ann. § 34A-2-101 et seq. 7
Va. Code Ann. § 65.2-100 et seq. 7
Virgin Islands Code, Tit. XXIV, § 250 et seq. 7
Vt. Stat. Ann., Tit. 21, § 601 et seq. 7
W. Va. Code Ann. § 23-1-1 et seq. 7
Wash. Rev. Code Ann. § 51.04.010 et seq. 7
Wis. Stat. Ann. § 102.01 et seq. 7
Wyo. Stat. Ann. § 27-14-101 et seq. 7

PETITION FOR WRIT OF CERTIORARI

Pursuant to the Rules of this Court and the All Writs Act (28 U.S.C. §§ 1257, 1651), J. KAMAU CHRISTOPHER a/k/a JOSEPH KAMAU CHRISTOPHER BEY (hereinafter referred to as the "Petitioner") hereby respectfully petitions the SUPREME COURT OF THE UNITED STATES to review the final judgment in this matter entered by the SUPREME COURT OF NORTH CAROLINA in favor of NORTH CAROLINA STATE UNIVERSITY, as a subordinate public office and entity in the GOVERNMENT OF THE STATE OF NORTH CAROLINA (hereinafter collectively referred to as the "State of North Carolina", the "State", the "Government", individually, or collectively and jointly, the "Respondent" or "Respondents") affirming judgment dismissing the instant action filed with the NORTH CAROLINA INDUSTRIAL COMMISSION with prejudice.

OPINIONS BELOW

The opinions and orders of the SUPREME COURT OF NORTH CAROLINA are unpublished (Pet. App. 23a-25a). The opinions and orders of the COURT OF APPEALS OF NORTH CAROLINA are unpublished (Pet. App. 14a-22a). The opinions and orders of the NORTH CAROLINA INDUSTRIAL COMMISSION are unreported (Pet. App. 1a-13a).

JURISDICTION

On September 4, 2008, the SUPREME COURT OF NORTH CAROLINA entered a judgment and order dismissing the Notice of Appeal and denying the Petition for Discretionary Review upon Certification filed by Petitioner (Pet. App. 23a-25a, 102a-144a). No pleading was filed with, nor order made by, the SUPREME COURT OF NORTH CAROLINA, with respect to a rehearing of this matter. This Court is authorized to review a federal question that has been passed upon by a state court of last resort where Petitioner has claimed a violation of any reserved and guaranteed rights, privileges, and immunities under the Constitution and the All Writs Act. See U.S. Const. art. III; 28 U.S.C. §§ 1257, 1651.

STATUTORY PROVISIONS INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV § 1.

STATEMENT OF CASE

I. Summary of Federal Question

The decisions below presents significant federal questions as to the constitutional validity of exclusions and immunities provided to employers and co-employees by universally mandated exclusive legislative industrial insurance programs, commonly referred to as "workers' compensation" (hereinafter referred to as the "Programs"). In *New York C. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917), this Court held that the Programs are not repugnant to the provisions of the Constitution, so long as the Programs provide an "adequate substitute" for the prohibited common law claims for civil remedy for personal injury by industrial accident in the workplace. The GENERAL COURT OF JUSTICE OF NORTH CAROLINA, comprised of the SUPREME COURT OF NORTH CAROLINA (hereinafter referred to as the "N.C. Supreme Court"), the COURT OF APPEALS OF NORTH CAROLINA (hereinafter referred to as the "N.C. Court of Appeals"), and various superior and district courts covering all jurisdictions within the State of North Carolina (hereinafter collectively referred to as the "N.C. Courts"), has applied this principle in *Johnson and Smith v. First Union Corporation*, 128 N.C. App. 450, 496 S.E.2d 1 (1998), cert. denied, 351 N.C. 648; 543 S.E.2d 870 (2000) and *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980), cert. denied, 301 N.C. 86 (1980), where it was held that if the North Carolina Workers' Compensation Act (hereinafter referred to as the "N.C.W.C.A.") has no application and does not

provide an "effective administrative remedy", the N.C.W.C.A. and the exclusivity provisions thereof have no application or effect to bar a common law claim for civil remedy against an employer or co-employee. See N.C. Gen. Stat. § 97-1 et seq.

In the instant case, Petitioner duly presented numerous objections showing that, despite the fact that Petitioner was employee of Respondent at a certain time in question with respect to the personal injury in question, the N.C.W.C.A. does not provide an effective administrative remedy, and thus has no application to bar the common law claim for civil remedy filed against Respondent in the instant case (Pet. App. 26a-177a; Record 32-175, 177-213, 280, 291-297). Despite these objections, the N.C. Courts passed on this appeal and these federal questions without adjudication of the objections presented and without significant or adequate finding of fact on the personal injury in question (Pet. App. 1a-177a, Record 32-175, 177-213, 280, 291-297). This dismissal was based solely on the grounds of the relationship between Petitioner and Respondent (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297).

Petitioner contends that N.C.W.C.A. does not provide an adequate substitute for a common law claim for civil remedy in the instant case, and, thus, this decision does not comport with the previous holdings of this Court to insure that the interpretation and official action in invoking the relevant provisions of the N.C.W.C.A. complies with the provisions of the Constitution of the United States of America, primarily the Fourteenth Amendment provisions for due process and equal protection (Pet. App. 26a-177a, Record 32-213, 280-

297). Moreover, the U.S. Court of Appeals has also held that a crucial federal question exist as to if all remedies at law can be eliminated by the exclusivity provisions of a workers' compensation law where workers' compensation is ineffective. *Dunlavey v. Economy Fire & Casualty Co.*, 887 F.2d 893 (8th Cir., 1989). Various state courts of last resort have also decided this important federal question, but there are widespread inconsistencies between the construction of the relevant statutes, the remedies provided, and the exceptions to the relevant exclusivity provisions (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297). In many jurisdictions, the original concept of the Programs was to provide employees with guaranteed benefits for injuries in the workplace (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297). At present, the Programs provide employers with immunity from all liability, even if the employee's benefits provided by the Programs are not an adequate substitute for the forfeiture of common law remedy, and without regard for employees' rights to due process (Pet. App. 1a-177a; Record 32-175, 177-213, 280, 291-297). It is critical that this Court address these inconsistencies to insure that constitutional protections provided to all citizens of the United States are not violated by the letter of, or official state action in administration of, the Programs. See Pet. App. 1a-177a; Record 32-175 (Petitioner's Response to Respondent's Motion for Summary Judgment and Motion to Suspend Discovery, and Petitioner's Cross Motion to Compel Discovery), 177-213, 280 (Petition for Extraordinary Relief before the North Carolina Court of Appeals), 291-297 (Assignments of Error for Appeal before the North Carolina Court of Appeals).

II. Statutory Background

All states and districts within the United States of America have adopted Programs that are universal mandates from their respective elected legislatures which guarantee expeditious universal industrial insurance for lost wages for all persons as "employees", adult or minor, in legal or illegal employment, a citizen or non-citizen, when "injured" by "accident" which "arises out of and in the course of the employment" (hereinafter referred to as an "industrial accident") in exchange for the forfeiture by statutory limitation of the right to seek a common law claim for civil remedy against the employer or co-employee, or any other legal entity bound to the employer by law (hereinafter referred to as the "exclusivity provisions"). Ala. Code § 25-5-1 et seq.; Alaska Stat. § 23.30.001 et seq.; Ariz. Rev. Stat. § 23-901 et seq.; Ark. Code Ann. § 11-9-101 et seq.; Cal. Lab. Code Ann. § 3200 et seq.; Colo. Rev. Stat. § 8-40-101 et seq.; Conn. Gen. Stat. § 31-291 et seq.; Del. Code Ann., Tit. 19,§ 2301 et seq.; D.C. Code Ann. § 32-1501 et seq.; Fla. Stat. § 440.01 et seq.; Ga. Code Ann. § 34-9-1 et seq.; Haw. Rev. Stat. § 386-1 et seq.; Idaho Code § 72-101 et seq.; Ill. Stat. Ann. 820, § 305/1 et seq.; Ind. Code Ann. § 22-3-1-1 et seq.; Iowa Code Ann. § 85.1 et seq.; Kan. Stat. Ann. § 44-501 et seq.; Ky. Rev. Stat. Ann. § 342.001 et seq.; La. Rev. Stat. Ann. § 23:1021 et seq.; Me. Rev. Stat., Tit. 39-A, § 101 et seq.; Md. Code Ann., Lab. & Empl., § 9-101 et seq.; Mass Gen. Laws c. 152, § 1 et seq.; Mich. Comp. Laws Ann. § 418.101 et seq.; Minn. Stat. Ann. § 176.0001 et seq.; Miss. Code Ann. § 71-3-1 et seq.; Mo. Rev. Stat. § 287.010 et seq.; Mont. Code Ann. § 39-71-101 et seq.; Neb. Rev. Stat. § 48-101 et seq.;

Nev. Rev. Stat. Ann. § 616.010 et seq.; N.H. Rev. Stat. § 281-A:1 et seq.; N.J. Stat. Ann. § 34:15-1 et seq.; N.M. Stat. Ann. § 52-1-1 et seq.; N.Y. Workers' Comp. Law § 1 et seq.; N.C. Gen. Stat. § 97-1 et seq.; N.D. Cent. Code, § 65-01-01 et seq.; Ohio Rev. Code Ann. § 4123.01 et seq.; Okla. Stat., Tit. 85, § 1 et seq.; Or. Rev. Stat. § 656.001 et seq.; Pa. Stat. Ann., Tit. 77, § 1 et seq.; R.I. Gen. Laws § 28-29-1 et seq.; S.C. Code Ann. § 42-1-10 et seq.; S.D. Codified Laws § 62-1-1 et seq.; Tenn. Code Ann. § 50-6-101 et seq.; Tex. Lab. Code Ann. § 401.001 et seq.; Utah Code Ann. § 34A-2-101 et seq.; Vt. Stat. Ann., Tit. 21, § 601 et seq.; Va. Code Ann. § 65.2-100 et seq.; Wash. Rev. Code Ann. § 51.04.010 et seq.; W. Va. Code Ann. § 23-1-1 et seq.; Wis. Stat. Ann. § 102.01 et seq.; Wyo. Stat. Ann. § 27-14-101 et seq. The territories and independent jurisdictions of the American Samoa, Guam, Navajo Nation, North Mariana Islands, Puerto Rico, and United States Virgin Islands all have adopted similar Programs. A.S.C.A. §§ 32.0501 et seq.; Guam Code Ann., Tit. 22, § 9101 et seq.; N.N.C.A., Tit. 15, § 1001 et seq.; N. Mar. I. Code, Tit. 4, § 9329 et seq.; P.R. Laws Ann., Tit. 11, § 1 et seq.; Virgin Islands Code, Tit. XXIV, § 250 et seq. The federal government also administers Programs that provide similar relief for federal employees and other specific groups of private employees. See 30 U.S.C. § 901 et seq.; 5 U.S.C. § 8101 et seq.; 33 U.S.C. § 901 et seq.; 42 U.S.C. § 7384 et seq.; 45 U.S.C. § 51 et seq.

It is well established that the Programs and exclusivity provisions are a constitutional use of state police power, and that the threshold question of compensation depends on the nature of the injury in question. See *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571,

35 S. Ct. 167, 59 L. Ed. 364 (1915); *New York C. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *Arizona Employers' Liability Cases*, 250 U.S. 400, 39 S. Ct. 553, 63 L. Ed. 1058 (1919); *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S. Ct. 227, 63 L. Ed. 527 (1919); *Lower Vein Coal Co. v. Industrial Board of Indiana*, 255 U.S. 144, 41 S. Ct. 252, 65 L. Ed. 555 (1921); *Ward & Gow v. Krinsky*, 259 U.S. 503, 42 S. Ct. 529, 66 L. Ed. 1033 (1922); *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923); *Heavner v. Town of Lincolnton*, 202 N.C. 400, 162 S.E. 909, appeal dismissed, 287 U.S. 672, 77 L. Ed. 579, 53 S. Ct. 4 (1932). However, in *New York C. R. Co. v. White*, this Court held that the provisions of any Program providing exclusive remedy must provide an "adequate substitute" to remedy at common law. 243 U.S. 188.

N.C. Courts further have established that the N.C.W.C.A. has to provide an "effective administrative remedy" in order to apply to bar a common law claim against an employer, and that intentional torts, and "intentional misconduct" which is defined as "misconduct substantially certain to cause serious injury or death", committed by the employer do not bar a common law claim against the employer. See *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980), cert. denied, 301 N.C. 86 (1980); *Johnson and Smith v. First Union Corporation*, 128 N.C. App. 450, 496 S.E.2d 1 (1998), cert. denied, 351 N.C. 648; 543 S.E.2d 870 (2000); *Richardson v. North Carolina Dept. of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-4,

301 S.E.2d 359, 365 (1983); *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

Moreover, in following the holdings of this Court, the N.C. Courts have established that the threshold question for the application of the N.C.W.C.A. is the injury in question, and that all parties have the substantial right to discover and present evidence relevant to the proceedings before judgment in order to examine the applicability of the N.C.W.C.A. See *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985); *Hargus v. Select Foods, Inc.*, 271 N.C. 369, 156 S.E.2d 737 (1967); *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964); *McNeely v. Carolina Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934); *Lovette v. Reliable Mfg. Co.*, 262 N.C. 288, 136 S.E.2d 685 (1964); *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971); *Ruffin v. Compass Group USA*, 150 N.C. App. 480, 563 S.E.2d 633 (2002); *Harden v. Thomasville Furn. Co.*, 199 N.C. 733, 155 S.E. 728 (1930); *Massey v. Board of Educ.*, 204 N.C. 193, 167 S.E. 695 (1933); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977); *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Fender v. G.E. Co.*, 260 F. Supp. 75 (W.D.N.C. 1966); *Fender v. G.E. Co.*, 380 F.2d 150 (4th Cir. 1967); *Wright v. Wilson Mem. Hosp.*, 30 N.C. App. 91, 226 S.E.2d 225 (1976); *Horne v. G.E. Co.*, 716 F.2d 253 (4th Cir. 1983); *Dolbrow v. Holland Indus., Inc.*, 64 N.C. App. 695, 308 S.E.2d 335 (1983); *Freeman v. SCM Corp.*, 311 N.C. 294, 316 S.E.2d 81 (1984); *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985); *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 510 S.E.2d 388 (1999); *Whitaker v. Town of*

Scotland Neck, 357 N.C. 552, 597 S.E.2d 665 (2003); *Powers v. Robeson County Memorial Hospital, Inc.*, 242 N.C. 290, 87 S.E.2d 510 (1955). As this Court found in *New York C. R. Co. v. White*, the original governmental rational and reasoning behind legislative industrial insurance was to ensure swift and guaranteed compensation for personal injury arising from an industrial accident for the employee in exchange for forfeiture, forever and always, the right to bring a common law action against the employer for same. 243 U.S. 188. This was to ensure that workers received adequate benefits for injury, particularly when negligence is questionable or the the injury was purely caused by accident, in which case the employee would typically receive no remedy under common law. *Id.* However, since 1917, the Programs have evolved from legislative industrial insurance to become legislative industrial accident insurance.

In Maine, Nebraska, Nevada, Rhode Island, American Samoa, the Navajo Nation and the Northern Mariana Islands, common law claims for intentional tort against an employer are exclusively barred without exception, but remedies for all work-related injuries, even those arising from intentional tort of the employer or a co-employee, qualify for compensation. *Cole v. Chandler*, 2000 ME 104, 752 A.2d 1189 (2000); *Ihm v. Crawford & Co.*, 254 Neb. 818, 580 N.W.2d 115 (1998); *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870; 8 P.3d 837 (2000); *Cianci v. Nationwide Ins. Co.*, 659 A.2d 662 (R.I. 1995); *Etimani v. Samoa Packing Co.*, 19 A.S.R.2d 1 (1991); *Nez v. Peabody Western Coal Co., Inc.*, 7 Nav. R. 416 (1999); *Santos v. Public Sch. Sys.*, 2002 MP 12; 6 N.M.I. 422 (2002).

In most other jurisdictions, including the remaining States, District of Columbia, Guam, Puerto Rico and U.S. Virgin Islands, where the Programs only provides remedy for personal injury by industrial accident, claims for personal injury or tort, such as claims of retaliation, intentional tort, intentionally inflicted emotional distress, and gross misconduct or negligence, such as sexual harassment or sexual assault, which do not "arise" by industrial accident are not barred by the exclusivity provisions, as the statutes do not provide adequate remedy, and thus do not apply. *Vacanti v. State Comp. Insurance Fund*, 24 Cal. 4th 800, 14 P.3d 234, 102 Cal. Rptr. 2d 562 (2001); *Rodriguez v. Naylor Industries, Inc.*, 763 S.W.2d 411 (Tex. 1989); *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152; 412 N.E.2d 934; 432 N.Y.S.2d 879 (1980); *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455; 564 N.E.2d 1222 (1990); *Fenner v. Municipality of Anchorage*, 53 P.3d 573 (Alaska 2002); *Ford v. Revlon, Inc.*, 153 Ariz. 38; 734 P.2d 580 (1987); *Gourley v. Crossett Pub. Sch.*, 333 Ark. 178; 968 S.W.2d 56 (1998); *DeOliveira v. Liberty Mut. Ins. Co.*, 273 Conn. 487; 870 A.2d 1066 (2005); *Grillo v. National Bank of Washington*, 540 A.2d 743 (D.C. 1988); *Iddings v. Mee-Lee*, 82 Haw. 1; 919 P.2d 263 (1996); *Tippmann v. Hensler*, 716 N.E.2d 372 (Indiana 1999); *Nelson v. Winnebago Indus.*, 619 N.W.2d 385 (Iowa 2000); *Stemple v. Md. Cas. Co.*, 282 Kan. 405; 144 P.3d 1273 (2006); *Moore v. Envtl. Constr. Corp.*, 147 S.W.3d 13; (Kentucky 2004); *Cole v. Dep't of Public Safety & Corr.*, 825 So. 2d 1134 (La. 2002); *Young v. Hartford Acci. & Indem. Co.*, 303 Md. 182, 492 A.2d 1270 (1985); *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1; 398 N.W.2d 882 (1986); *Hildebrandt v. Whirlpool Corp.*, 364 N.W.2d

394 (Minn. 1985); *Blailock v. O'Bannon*, 795 So. 2d 533 (Miss. 2001); *Burns v. Smith*, 214 S.W.3d 335 (Mo. 2007); *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148; 609 P.2d 257 (Mont. 1980); *Karch v. Baybank FSB*, 147 N.H. 525; 794 A.2d 763 (2002); *Millison v. E. I. Du Pont de Nemours & Co.*, 101 N.J. 161; 501 A.2d 505 (1985); *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272; 2001 NMSC 34; 34 P.3d 1148 (2001); *Zimmerman v. Valdak Corp.*, 1997 ND 203; 570 N.W.2d 204 (1997); *Parret v. Unicco Serv. Co.*, 2005 OK 54; 127 P.3d 572 (2005); *McSwain v. Shei*, 304 S.C. 25; 402 S.E.2d 890 (1991); *In re Certification of Question of Law from United States Dist. Court*, 399 N.W.2d 320 (S.D. 1987); *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239; (Tenn. 2003); *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055; 176 Utah Adv. Rep. 11 (1991); *Mead v. Western Slate, Inc.*, 2004 VT 11, 176 Vt. 274, 848 A.2d 257 (2004); *Middlekauff v. Allstate Ins. Co.*, 247 Va. 150; 439 S.E.2d 394 (1994); *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190; 640 S.E.2d 540 (2006); *Birklid v. The Boeing Co.*, 127 Wn.2d 853; 904 P.2d 278 (1995); *Coleman v. American Universal Ins. Co.*, 86 Wis. 2d 615; 273 N.W.2d 220 (1979); *Wood v. Guam Power Auth.*, 2000 Guam 18 (2000); *Guzman-Cotto v. E.L.A.*, 156 D.P.R. 693; 2002 TSPR 59 (2002); *Robles v. Hovensa*, L.L.C., No. 2007/28, V.I. Sup., 49 V.I. 491 (2008). Notwithstanding, adjudication of claims involving the exclusivity provisions do not always provide the employee due process to determine the effectiveness of the administrative remedy provided by the Program in each case, or to determine if the Program provides an adequate substitute for the common law remedy.

Though state courts of last resort in Alabama, Colorado, Delaware, Massachusetts, and Wyoming have held that their respective jurisdictions allow common law claims for personal injury arising from intentional tort in the workplace, intentional tort claims can only be brought against co-employees, providing the employer with immunity, regardless of the liability of employer. *Busby v. Truswal Systems Corp.*, 551 So. 2d 322 (Ala.1989); *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001); *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157 (Del. 2000); *Doe v. Purity Supreme*, 422 Mass. 563; 664 N.E.2d 815 (1996); *Parker v. Energy Dev. Co.*, 691 P.2d 981 (Wyo. 1984)

The Pennsylvania Supreme Court has not only held that an employee can pursue a civil remedy under common law against a co-employee, but, where common law claims against the employer are questionable, a tort action cannot be dismissed until injury is found to be compensable under the Programs. *Heath v. Workers' Comp. Appeal Bd.*, 580 Pa. 174; 860 A.2d 25 (2004).

The Ohio Supreme Court has not only found that common law claims against an employer for intentional tort cannot be barred by the exclusivity provisions of the Programs, but further found a statute barring common law claims for intentional tort against an employer to be unconstitutional by violation of due process and equal protection provisions where the bar was without an "adequate substitute". *Brady v. Safety-Kleen Corp.*, 61 Ohio St. 3d 624; 576 N.E.2d 722 (1991); *Johnson v. BP Chems., Inc.*, 85 Ohio St. 3d 298; 1999 Ohio 267; 707 N.E.2d 1107 (1999); *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100; 522 N.E.2d 489 (1988).

The state courts of last resort in Florida, Georgia, Idaho, Oregon, and Vermont have held that an employee has the right to pursue a common law claim for civil remedy for personal injury arising from intentional tort, and further held that where the Programs do not provide adequate remedy, the exclusivity provisions thereof do not bar a common law claim against employer. *Jones v. Martin Elecs., Inc.*, 932 So. 2d 1100 (Fla. 2006); *Potts v. Uap-Ga Ag Chem*, 270 Ga. 14; 506 S.E.2d 101 (1998); *Kearney v. Denker*, 114 Idaho 755; 760 P.2d 1171 (1988); *Errand v. Cascase Steel Rolling Mills*, 320 Ore. 509; 888 P.2d 544 (1995); *Wolfe v. Yudichak*, 153 Vt. 235; 571 A.2d 592 (1989).

The Tennessee Supreme Court held that even though an employee was permanently disfigured by a personal injury which arose by accident out of and in the course of her employment, but for which she was not eligible for compensation because she did not lose wages, her only remedy was the Program, which would have provided her with limited benefits and no significant consideration for her personal injury in the workplace. *Clayton v. Pizza Hut, Inc.*, 673 S.W.2d 144 (Tenn. 1984).

This Court, the U.S. Court of Appeals and the Florida Supreme Court have specifically addressed the inapplicability of the exclusivity provisions of the Programs for claims of intentional tort such as sexual harassment. *Forrester v. White*, 484 U.S. 219; 108 S. Ct. 538; 98 L. Ed. 2d 555 (1988); *Hirase-Doi v. U.S. West Communs., Inc.*, 61 F.3d 777 (10th Cir. 1995); *Bator v. Hawaii*, 39 F.3d 1021 (9th Cir. 1994); *Byrd v. Richardson-Greenshields Secur., Inc.*, 552 So. 2d 1099 (Fla. 1989).

The U.S. Court of Appeals has also adjudicated common law claims against employers or co-employees in the jurisdictions of Arkansas, California, Florida, Illinois, Maryland, Mississippi, Louisiana, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and West Virginia, interpreting the applicable Programs, while analyzing the federal questions presented, and holding that intentional tort common law claims cannot be barred by the Programs because the Programs do not provide an adequate substitute. *Connolly v. Maryland Casualty Co.*, 849 F.2d 525 (11th Cir. 1988); *Hollman v. Liberty Mut. Ins. Co.*, 712 F.2d 1259 (8th Cir. 1983); *Gantt v. Sec., USA, Inc.*, 356 F.3d 547 (4th Cir. 2004); *Mullins v. Biglane Operating Co.*, 778 F.2d 277 (5th Cir. 1985); *Dunn v. Peabody Coal Co.*, 855 F.2d 426 (7th Cir. 1988); *Worthen v. Kennecott Corp.*, 780 F.2d 856 (10th Cir. 1985); *Wilson v. Asten-Hill Mfg. Co.*, 791 F.2d 30 (3rd Cir. 1986); *Pyle v. Dow Chemical Co.*, 728 F.2d 1129 (8th Cir. 1984); *Kuhnert v. John Morrell & Co. Meat Packing*, 5 F.3d 303 (8th Cir. 1993); *Subbe-Hirt v. Baccigalupi*, 94 F.3d 111 (3rd Cir. 1996); *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); *Larroquette v. Cardinal Health 200, Inc.*, 466 F.3d 373 (5th Cir. 2006); *Smith v. GMC*, 172 Fed. Appx. 661 (6th Cir. 2006); *Arthur v. E.I. Dupont de Nemours & Co.*, 58 F.3d 121 (4th Cir. 1995); *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657 (6th Cir. 2005); *Jensen v. County of Santa Clara*, 69 F.3d 544 (9th Cir. 1995).

The U.S. Court of Appeals has also adjudicated common law claims against employers in the jurisdiction of North Carolina, and, in consideration of the federal questions presented

therewith, held that an employee could pursue an intentional tort common law claim against an employer, and further that summary judgment for an employer is inappropriate where genuine issues of material fact and triable issues of fact exists as to the alleged intentional tort or intentional misconduct. *Wilent v. FMC Corp.*, 129 F.3d 118 (4th Cir. 1997). As N.C. Courts found in *Brown* and *Johnson*, it is well established that the N.C.W.C.A. acts as a legislative industrial accident insurance where only lost wages due to personal injury by industrial accident are compensable under the statutes. It is appropriate that N.C. Courts have held that, for all other claims against an employer or co-employee, an employee is not barred by the N.C.W.C.A. where the N.C.W.C.A. does not provide an effective administrative remedy. However, N.C. Courts have also permitted the dismissal of numerous common law claims against employers where the N.C.W.C.A. did not provide an effective administrative remedy, including the instant case. See *Ryles v. Durham County Hospital Corporation, Inc.*; 107 N.C. App. 455; 420 S.E.2d 406 (1992); *Richardson v. North Carolina Department of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996); *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 593 S.E.2d 416 (2004).

In consideration of the foregoing decisions and opinions of this Court, U.S. Court of Appeals, and every court of last resort of independent jurisdictions under the jurisdiction of the Constutition of the United States of America, Petitioner prays that this Court will consider this crucial federal question as to the rights of employees under the Programs.

III. Factual Background

Prior to 1999, the North Carolina General Assembly, the legislative branch of the State Government, mandated that all constituent institutions of the University of North Carolina System ("UNC System") inspect all facilities and provide a comprehensive report (Pet. App. 145a). In December 1999, a comprehensive report published by Respondent found that more than fifty (50%) percent of the facilities owned, operated and maintained by Respondent and commonly known as North Carolina State University (hereinafter referred to as "NCSU", in reference to the campus, facilities, and the entire student, staff and faculty community as opposed to Respondent) failed to meet building and safety code standards (Pet. App. 145a-150a). Reports also found systematic facility deficiencies at multiple campuses in the UNC System, including North Carolina Central University ("NCCU") and the University of North Carolina at Pembroke ("UNCP") (Record 32-175). The reports also identified insufficient or inadequate heating, ventilation and air conditioning systems ("HVAC Systems"), and that numerous facilities required mitigation of asbestos and lead paint (Record 32-175). The reports further represented that various facilities and programs were "unsafe" and posed risks to student, staff and faculty health and safety (Pet. App. 145a-150a).

It is undisputed that Petitioner enrolled at Respondent NCSU as a full-time student from August 1999 until May 2004 (Pet. App. 17a). In August 2002, Petitioner was offered and accepted employment with Respondent NCSU as a Resident Advisor, with compensation in the form of a stipend

below minimum wage, housing and other monetary and physical services, such as parking and spending allowances for meals (Pet. App. 17a-18a). Petitioner resided in the housing provided through employment as a Resident Advisor in Wood Hall from August 2002 to May 2003, and again from August 2003 to September 2003, and in Metcalf Hall from May 2003 to August 2003 (Pet. App. 17a-18a, 47a-50a). Prior to this period of employment, Petitioner enlisted with the United States Naval Reserve for a contract period of eight (8) years in July 2002 (Pet. App. 17a-18a, 47a-50a). Before enlisting, Petitioner was subject to a rigorous physical ability test, and an extensive physical exam, to determine if Petitioner was physically fit and medically qualified for military service, and the United States Navy Reserve determined that Petitioner was physically fit and medically qualified for military service prior to July 2002 (Pet. App. 17a-18a, 47a-50a; Record 32-175).

In October 2001, Petitioner suffered a chronic acute respiratory infection and tonsillitis, which condition persisted for approximately one month, however, no cause for this condition was identified (Record 32-175). In August 2002, petitioner suffered a chronic acute respiratory infection, along with interim periods of flu-like, bronchitis-like, and pneumonia-like chest congestion, migraine headaches, vomiting, severe weight loss, and tonsillitis, among other conditions, which conditions persisted until October 2003 (Pet. App. 17a-18a, 151a-153a). On October 7, 2002, Petitioner, along with maintenance staff of Respondent, identified chronic mold growth in the HVAC System in Wood Hall (Pet. App. 47a-50a, 151a-153a, Record 32-175). Maintenance staff represented, from experience, that

the air filter in the HVAC System unit in question appeared to be at least two (2) years old, though the air filters should have been changed at least every six (6) months (Pet. App. 151a-153a). This was documented in an administrative memorandum submitted to Respondent, which was included in the record (Record 32-175). Between May 2003 and August 2003, NCSU, as well as the rest of North Carolina, experienced unprecedented flooding, which floodwaters penetrated various NCSU facilities (Pet. App. 47a-50a, Record 32-175). In August 2003, multiple facilities were closed at NCCU and UNCP for mold growth and other health hazards, threats and risks (Record 32-175). Student, staff and faculty at NCSU questioned the difference in responses at NCCU and UNCP as compared to NCSU (Record 32-175). Employees of Respondent, including Petitioner, were instructed not to say the word "mold" to any students moving into on-campus facilities or their parents (Record 32-175).

On September 17, 2003, an article was published in a NCSU student publication about mold and other health hazards in NCSU facilities (Record 64-65). On the same day Respondents Timothy Luckadoo and Gary Thompson exchanged e-mail correspondence amongst other officers and employees of Respondent (Pet. App. 169a-170a). Respondent Timothy Luckadoo represented to superiors that Respondent's maintenance of the HVAC Systems and other alleged hazards was appropriate and within the prescribed duty of care owed to student, staff and faculty (Pet. App. 169a). However, Respondent Gary Thomspon represented that the conditions described in the article were common considering the age of the HVAC Systems,

and that it was common knowledge for facilities staff that the HVAC Systems needed to be replaced and suggested discussing such replacement (Pet. App. 170a).

On the same day, Petitioner was verbally threatened by Respondent and resigned from his position of employment, and vacated the premises in question (Pet. App. 47a-50a, Record 32-175). On September 24, 2003, Respondent sponsored a response to the initial article to correct any "misperceptions" or "incorrect information", without any reference to the observations or professional opinions of maintenance or facility staff (Record 64-68). Simultaneously, the State hired numerous third party and public servant experts to test the air quality and various surfaces throughout the facilities in question at NCCU and UNCP (Pet. App. 47a-50a, Record 32-175). Emergency construction and renovation projects were commenced in all facilities at NCCU and UNCP deemed infested with mold and other health hazards, but no emergency action was taken at NCSU (Pet. App. 47a-50a, Record 32-175).

Between September 2003 and December 2003, Petitioner, together with other student, staff and faculty at NCSU, authored a 145-page report as a rebuttal to Respondent's published response calling a "systematic" problem of health hazards a "misperception" (Pet. App. 47a-50a, Record 32-175). This 145-page report was hand delivered by Petitioner to the Respondent Office of the Governor of the State of North Carolina (hereinafter referred to as the "Governor") on January 21, 2004 (Pet. App. 47a-50a, 151a-153a; Record 32-175). On January 23, 2004, the Respondent North Carolina Department of Health and Human Services, on behalf of the

Respondent Governor, confirmed receipt and confirmed that the State would be initiating an investigation (Pet. App. 47a-50a, 151a-153a; Record 32-175).

At the same time, Respondent deceived and falsified information pertaining to this matter even to the authorities with executive oversight of occupational and health hazards. In a letter to the Respondent North Carolina Department of Labor, Respondent Tim Luckadoo represented that there were no systematic hazards, threats or risks to the health and safety of student, staff and faculty at NCSU, despite the representations of Respondent Gary Thompson, while specifically citing the administrative memorandum submitted by Petitioner to Respondent (Pet. App. 145a-177a). As a result, the North Carolina Department of Labor subsequently closed the case on this matter (Pet. App. 173a). At the same time, Respondent Timothy Blair represented that Wood Hall required renovation to ensure code compliance (Pet. App. 174a-177a)

Petitioner was honorably discharged from the United States Navy Reserve in June 2005 due to the acquisition of chronic respiratory conditions, primarily extrinsic asthma, and the early termination of this enlistment contract was caused by the medical disqualification of Petitioner for medical service and resulted in significant monetary damage to Petitioner (Pet. App. 17a-18a, Record 32-175). During this interim period, Respondent never conducted the investigation called by the Governor to the same standards used in the investigations and inspections at NCCU and UNCP, such as air quality or toxicity test (Pet. App. 145a-177a).

IV. Procedural History

Pursuant to the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291 et seq., Petitioner filed a certain affidavit of tort claim on December 30, 2005 (hereinafter the "Tort Claim") with the NORTH CAROLINA INDUSTRIAL COMMISSION (hereinafter referred to as the "Trial Court"), naming Respondent as committing negligence acts in the breach of Respondent's duty of care to Petitioner, which breach was the direct and proximate cause of injury to Petitioner (Record 2-5). The Trial Court is an executive administrative agency created by the North Carolina General Assembly pursuant to N.C. Gen. Stat. § 97-77, which is not part of the N.C. Courts, but is authorized to hear judicial claims as a trial court brought under the North Carolina Tort Claims Act and the N.C.W.C.A. by the power vested by the North Carolina General Assembly. See N.C. Const., art. I, § 6; N.C. Const. art. III, § 1; N.C. Const. art. III, § 11; N.C. Const., art. IV, § 1; N.C. Const. art. IV, § 3; N.C. Gen. Stat. § 7A-1 et seq.; N.C. Gen. Stat. § 143B-1 et seq.; *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

On March 9, 2006, Respondent timely filed an answer to the Tort Claim denying all guilt, and presenting three (3) affirmative defenses, which were N.C.W.C.A. exclusivity provisions based on Petitioner's employment with Respondent, statute of limitations, and contributory negligence, and simultaneously served Petitioner with a discovery request (Record 6-31). Petitioner responded to

Respondent's discovery request on May 1, 2006, and simultaneously served Respondent with a discovery request (Record 32-175). In said discovery request, Petitioner made reference to announced renovation of certain facilities owned, operated and maintained by Respondent which were identified as the direct and proximate cause of personal injury to Petitioner (Record 108-127). Petitioner also addressed all three (3) of Respondent's affirmative defenses by asserting, through sworn testimony and narrative responses, that (i) the personal injury of Petitioner was attributable to the negligence of Respondent during the time both before and after employment; the personal injury of Petitioner did not "arise" by "accident" "out of and in the course and scope of the employment"; and the personal injury of Petitioner was caused by the "intentional misconduct" of Respondent, which was defined as "misconduct substantially certain to cause serious injury or death" to Petitioner; (ii) the accrual of the personal injury of Petitioner occurred on June 9, 2005, even though Petitioner initiated a relationship with Respondent in August 1999, and Petitioner was diagnosed with the medical condition identified as the personal injury in question in November 2003, and (iii) Petitioner made every reasonable effort to meet or exceed his duty of care to himself, while at the same time Petitioner was deceived by Respondent, who provided misrepresentations as to the duty of care owed to Petitioner, and the hazards, threats and risks to Petitioners health, of which Respondent was aware (Record 108-127).

In an internal memorandum dated June 9, 2006, which Respondent provided to Petitioner through a public records requests, Respondent made

no mention of the affirmative defenses of statute of limitations or contributory negligence and counsel for Respondent questioned if the affirmative defense of N.C.W.C.A. exclusivity would be a "viable motion", but that it was being "considered" (Pet. App. 174a-175a). Respondent also began drafting a response to Petitioner's discovery request, which draft Respondent provided to Petitioner through public records requests, disclosing that Respondent intended to proceed with the renovations as scheduled during the proceedings, and that the renovations, announced by press release on January 31, 2006, after the filing of this claim, would provide substantial alteration of the heating, ventilation and air conditioning system ("HVAC System"), which was recommended by Petitioner and Respondent Gary Thomspon in 2003 (Pet. App. 176a-177a).

On July 20, 2006, Respondent filed a motion for summary judgment and motion for suspend discovery during the pendency of discovery exchange without providing a response to Petitioner's discovery request, in which Respondent abandoned the affirmative defenses of statute of limitations and contributory negligence and asserted the applicability of the N.C.W.C.A. and the exclusivity provisions thereof (Record 10-31). On August 11, 2006, Petitioner responded with a thorough response and a Cross-Motion to Compel Respondent to respond to Petitioner's discovery request, in which Petitioner provided Petitioner's entire discovery response, including exhibits, showing that there were genuine issues of triable issues as to the time, place, circumstance and nature of the personal injury in question (Record 32-175). Most relevant, Petitioner showed that (i) Respondent failed to show

that the injury in question "arose" by "accident" "out of and in the course and scope of the employment", (ii) Respondent was alleged to have committed "intentional misconduct" which was the direct and proximate cause of personal injury to Petitioner, (iii) the injury did not "arise" by "accident" "out of and in the course and scope of the employment", (iv) Petitioner was prejudiced by the suspension of discovery, and (v) there existed genuine issues of material fact and triable issues of fact as to all of the foregoing contentions (Record 32-175, 177-213). No significant or adequate findings of fact were made on the injury, and the Trial Court dismissed this Tort Claim with prejudice (Pet. App. 1a-13a).

Petitioner duly, timely and properly filed an appeal of right and petitions for extraordinary relief with the N.C. Court of Appeals asserting violation of constitutional rights to due process and equal protection under the law, pursuant to N.C. Gen. Stat. § 7A-29; N.C. Gen. Stat. § 7A-32 (Record 268-270). On October 30, 2007, Petitioner filed a Petition for Writ of Mandamus, Prohibition and Supersedeas, with an Incorporated Petition for an Immediate Change of Venue and New Trial with the N.C. Court of Appeals, seeking extraordinary relief given the renovation of the facilities in question and other misconduct by the Trial Court (Record 280). The N.C. Court of Appeals denied Petitioner's Petition by orders entered on November 14, 2007 (Pet. App. 14a-15a). On December 14, 2007, Petitioner duly, timely and properly filed the Record on Appeal with the N.C. Court of Appeals, which contained the questions for appellate review, which included questions challenging the actions of the Trial Court as a violation of the rights of Petitioner to equal

protection and due process of law under the Constitution of the State of North Carolina and the Constitution of the United States of America, primarily citing the provisions of the Fourteenth Amendment of the Constitution of the United States of America (Record 1-299). In pertinent part, these appellate questions contended that, after the course of due process where Petitioner and Respondent were afforded the opportunity to plead before the authorized administrative agency with statutory authority as a trial court, Petitioner was denied his right to due process in obtaining evidence relevant to these proceedings from the opposing party and incorrectly assigned a statutory classification without adequate evidence, in violation of the Fourteenth Amendment of the Constitution of the United States of America (Pet. App. 26a-43a; Record 293-297). Petitioner duly, timely and properly filed a brief in support of appeal with the North Carolina Court of Appeals, which provided further legal and factual support for the questions for appellate review (Pet. App. 26a-76a; Record 293-297). Respondent duly, timely and properly responded (Pet. App. 77a-88a). Petitioner moved the N.C. Court of Appeals to allow Petitioner to submit a reply brief, which motion was granted, due to the new questions Respondent raised in an attempt to disqualify evidence submitted by Petitioner (Pet. App. 89a-99a). The N.C. Court of Appeals allowed Petitioner's reply brief in which Petitioner asserted the summary judgment hearing provided all parties wih the opportunity to present any and all evidence in support of the assertions and defenses made at the hearing (Pet. App. 89a-101a).

On May 20, 2008, the Court of Appeals entered an order affirming the dismissal of this Tort Claim, citing that the findings and conclusions of law are conclusive if supported by the competent evidence, and further finding that it was not necessary to address the remaining assignments of error presented by Petitioner (Pet. App. 16a-22a).

Petitioner duly, timely, and properly filed a Notice of Appeal of Right, Petition for Discretionary Review, and Petition for Writ of Supersedeas with the N.C. Supreme Court again asserting violation of constitutional right to due process, pursuant to N.C. Gen. Stat. § 7A-30; N.C. Gen. Stat. § 7A-31; N.C. Gen. Stat. § 7A-32. (Pet. App. 102a-134a). Respondent filed a Motion to Dismiss the Appeal in response (Pet. App. 135a-144a). Despite this pending appeal during this correspondence exchange, Respondent referred to this Tort Claim as "failed". (Pet. App. 161a-162a). On August 22, 2008, Petitioner filed a Motion for Temporary Stay, Motion to Amend the Record on Appeal and Motion to Expedite the Appeal, together with 481 pages of documentation obtained in response to the request for public information and public records (Pet. App. 23a-25a, 156a-160a). The N.C. Supreme Court granted Respondent's Motion to Dismiss the Appeal and denied all of the Petitioner's petitions contemporaneously on September 4, 2008 (Pet. App. 23a-25a). The N.C. Supreme Court is the court of last resort in the State of North Carolina and is the court of original and supreme appellate jurisdiction. See N.C. Const. art. IV; N.C. Gen. Stat. § § 7A-25, 7A-26. The order of the North Carolina Supreme Court is final, and dismisses this matter in all respects (Pet. App. 23a-25a).

JUSTIFICATION FOR GRANT OF THIS WRIT

I. Petitioner duly, timely and properly presented a federal question in these proceedings and the federal question was maintained throughout these proceedings to the state court of last resort.

In the course of due process in civil proceedings in adjudication of a common law claim for remedy, Petitioner and Respondent were entitled to seek evidence, file pleadings, and prepare for trial by jury for the purpose of seeking remedy and defending life, liberty and property in the interest of justice. Both Petitioner and Respondent exercised this right in the initiation of the proceedings, service of discovery requests, and pleadings addressing the subject matter jurisdiction of the Trial Court to hear this Tort Claim (Record 1-261). Upon the dismissal of this Tort Claim without the close of evidence and substantial and adequate findings of fact on the personal injury in question, the rights of Petitioner for due process and equal protection were violated (Pet. App. 26a-76a). Immediately upon appeal from the Trial Court to the N.C. Court of Appeals, Petitioner presented the provisions of the Constitution of the United States of America that were violated by the actions taken by the Trial Court (Pet. App. 26a-76a). No constitutional challenge to the relevant statutory provisions was presented, as it is well established that the relevant statutory provisions, when invoked as contemplated by the applicable legal precedents, comports with the provisions of the Constitution of the United States of America and the Constitution of the State of North

Carolina (Pet. App. 26a-76a). This constitutional challenge asserts that Petitioner was denied due process of law and equal protection under the law upon the improper dismissal of this Tort Claim before the Trial Court (Pet. App. 26a-76a). Petitioner presented questions as to the right to due process as guaranteed by the relevant provisions of the Fourteenth Amendment of the Constitution of the United States of America, which guarantees Petitioner the rights incorporated by reference in the Fifth Amendment and Seventh Amendment of the Constitution of the United States of America. Furthermore, the same rights, privileges and protections are guaranteed by Sections 5, 18 and 19 of Article I of the Constitution of the State of North Carolina. See U.S. Const. amend. V.; U.S. Const. amend. VII; U.S. Const. amend. XIV § 1; N.C. Const. art. I, § 5; N.C. Const. art. I, § 18; N.C. Const. art. I, § 19. (Pet. App. 26a-76a).

The N.C. Courts passed on this federal question by inexcusably failing to adjudicate Petitioner's duly presented objections, failing to adjudicate the exceptions to the exclusivity provisions of the N.C.W.C.A., and failing to adjudicate the federal questions presented as arising therefrom (Pet. App. 1a-144a). In the instant case at bar, while there is no controversy over the employment relationship between Petitioner and Respondent, the controversy presented is the time, place, circumstances and nature of the injury in question (Pet. App. 26a-76a). In addressing this question, the N.C. Courts have held that findings of fact must be made with respect to the injury, and the injury must be found to arise by industrial accident (Pet. App. 26a-76a).

II. The North Carolina Supreme Court passed on this federal question

In passing on this federal question, the N.C. Court of Appeals failed to exercise the proper standard of appellate review, which holds that the standard of review of a federal question before the N.C. Courts is the same as the standard of review for this Court. See *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996); *Duggins v. N.C. State Bd. of CPA Examiners*, 294 N.C. 120, 240 S.E.2d 406 (1978); *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 446 S.E.2d 332 (1994); *In re Assessment of Use Taxes Against Village Publishing Corp.*, 312 N.C. 211, 322 S.E.2d 155 (1984) appeal dismissed, 472 U.S. 1001, 86 L. Ed. 2d 710, 105 S. Ct. 2693 (1985); *Powe v. Odell*, 312 N.C. 410, 322 S.E.2d 7624 (1984); *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983).

The judgment from the N.C. Court of Appeals found that the findings of the Trial Court were conclusive on appeal, but did not exercise an independent jurisdiction to examine if the official actions of the State were repugnant to the provisions of the Constitution of the United States of America (Pet. App. 1a-144a). It is well established that the federal courts have an independent jurisdiction in the administration of state laws, coordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. This Court adopts the construction of state law as determined by the state court of last resort, for a federal challenge of constitutionality of the state law, but has independent authority to examine if state law or

official state action is repugnant to the provisions of the Constitution of the United States of America. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 30 S. Ct. 140, 54 L. Ed. 228 (1910); *Cook v. Moffat & Curtis*, 46 U.S. 295, 12 L. Ed. 159 (1847); *Burgess v. Seligman*, 107 U.S. 20, 2 S. Ct. 10, 27 L. Ed. 359 (1882); *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U.S. 532, 24 S. Ct. 576, 48 L. Ed. 778 (1904); *Yazoo & M. V. R. Co. v. Adams*, 181 U.S. 580, 21 S. Ct. 729, 45 L. Ed. 1011 (1901); *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 48 S. Ct. 489, 72 L. Ed. 801 (1928); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940).

Notwithstanding contentions that the findings of fact and conclusions of law were not supported by the competent evidence, Petitioner duly, timely and properly sought appellate review by the N.C. Supreme Court (Pet. App. 102a-134a). In Respondent's Motion to Dismiss the Appeal filed with the N.C. Supreme Court, Respondent moves for dismissal based on grounds that no constitutional question was presented (or no constitutional question with merit was presented) (Pet. App. 135a-144a). All of Respondent's contentions are without merit (Pet. App. 26a-144a). Petitioner contends, and the record shows, that substantial and crucial constitutional questions were timely presented immediately following the official state action from which the constitutional question arose (Pet. App. 1a-144a). Notwithstanding the grounds for dismissal of the appeal, the N.C. Supreme Court has passed on this federal question (Pet. App. 1a-25a).

III. This Court has an independent jurisdiction to review this matter on appeal and should grant this Writ

Administrative proceedings are due process for the purposes of judicial review. *Lerner v. Casey*, 357 U.S. 468, 78 S. Ct. 1311, 2 L. Ed. 2d 1423 (1958).

The Constitution of the United States of America, and applicable statutory authority, gives this Court appellate jurisdiction to review this federal question. See *Lytle v. Ark.*, 63 U.S. 193, 16 L. Ed. 306 (1859); *El Paso & S. R. Co. v. Eichel & Weikel*, 226 U.S. 590, 33 S. Ct. 179, 57 L. Ed. 369 (1913); *Union Mut. Life Ins. Co. v. Kirchoff*, 169 U.S. 103, 18 S. Ct. 260, 42 L. Ed. 677 (1898).

In reviewing state court judgments under 28 U.S.C. § 1257, the United States Supreme Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court has been asked to review. When the highest state court is silent on a federal question before it, the Supreme Court of the United States assumes that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented. *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997). However, the opinion of the state court constitutes no part of the record, for the purpose of determining whether the United States Supreme Court will re-examine its final judgment or decree. *Gross v. United States Mortg. Co.*, 108 U.S. 477, 2 S. Ct. 940, 27 L. Ed. 795 (1883).

Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, the United States Supreme Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court. *Staub v. City of Baxley*, 355 U.S. 313; 78 S. Ct. 277; 2 L. Ed. 2d 302 (1958); *National Exchange Bank v. Wiley*, 195 U.S. 257, 25 S. Ct. 70, 49 L. Ed. 184 (1904); *Cooper v. Newell*, 173 U.S. 555, 19 S. Ct. 506, 43 L. Ed. 808 (1899).

State policy must give way when it operates to hinder vindication of federal constitutional guaranties. See *North Carolina State Board of Education et al. v. Swann et al.*, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971); *United States v. Cruikshank et al.*, 92 U.S. 542, 23 L. Ed. 588 (1876); *United States v. Scotland Neck City Board of Education et al.*, 407 U.S. 484; 92 S. Ct. 2214, 33 L. Ed. 2d 75 (1972).

The standard of review is to examine the specific facts of the instant case and determine if Petitioner was deprived of equal protection, given that private biases are outside the real of the law, but official state action cannot, directly or indirectly, give such biases effect. *City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc., et al.*, 473 U.S. 432; 105 S. Ct. 3249; 87 L. Ed. 2d 313 (1985); *McLaughlin et al. v. Florida*, 379 U.S. 184; 85 S. Ct. 283; 13 L. Ed. 2d 222 (1964); *Loving v. Virginia*, 388 U.S. 1; 87 S. Ct. 1817; 18 L. Ed. 2d 1010 (1967).

Indeed, this crucial federal question arises primarily due to the conclusions of law holding that

the Trial Court made "no determination as to the merits of" Petitioner's claims under N.C.W.C.A. (Pet. App. 1a-25a). This conclusion of law is expressly in conflict with the decisions of this Court, primarily *New York C. R. Co. v. White*, and various other relevant decisions of the U.S. Court of Appeals and other state courts of last resort. 243 U.S. 188.

CONCLUSION

In consideration of the foregoing, Petitioner shows this Court should grant this petition for a writ of certiorari.

This the 19th day of December 2008.

Respectfully submitted,

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APPENDIX A

NORTH CAROLINA INDUSTRIAL COMMISSION

No. TA-19383

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT

DECISION AND ORDER

BEFORE WANDA BLANCHE TAYLOR,
DEPUTY COMMISSIONER

BY WANDA BLANCHE TAYLOR,
DEPUTY COMMISSIONER

FILED FEBRUARY 9, 2007

Based on the forecast of evidence by the parties at the November 9, 2006 hearing, and the representations of the parties and evidence of record, the Undersigned makes the following

Findings of Fact

1. Plaintiff filed his Tort Claim Affidavit, Form T-1, on December 30, 2005, with the Industrial Commission alleging, in pertinent part, that during September through November 2003, he was an employee and Resident Advisor for Defendant, and allegedly was exposed to a "substandard and unhealthy indoor environment, primarily mold, in Wood Hall".

2. Defendant timely answered and moved to dismiss Plaintiff's tort claim on basis that it was barred by the North Carolina Workers' Compensation Act, and that Plaintiff's exclusive remedy was to file a Workers' Compensation claim.

3. Defendant also filed a motion for summary judgment, which was heard before the Undersigned in Raleigh on November 9, 2006.

4. Attached to Defendant's motion for summary judgment was a sworn Affidavit of Timothy S. Blair, Associate Director of University Housing for Defendant, with Exhibits.

5. The sworn statements made by Mr. Blair in his Affidavit are found to be credible and competent evidence in a summary judgment proceeding, along with the documents and exhibits attached to the

motion, and the same are incorporated into this Decision and Order by reference and made findings of fact as if set out fully herein.

6. Plaintiff was employed with Defendant as a Resident Advisor during the time period that Plaintiff allegedly was exposed to a mold; Plaintiff was compensated financially for residing in the residence hall where he allegedly was exposed to mold; and Plaintiff would not have resided in Wood Hall but for his employment status as a Resident Advisor with Defendant.

7. An employment relationship existed between Plaintiff and Defendant at the time Plaintiff was allegedly exposed to the allegedly "substandard and unhealthy indoor environment" set out in Plaintiff's Tort Claim Affidavit.

8. Plaintiff did not submit to the court any sworn Affidavits by witnesses, or any other competent evidence during the summary judgment hearing, to rebut Defendant's contention that Plaintiff was an employee of Defendant at all relevant times.

Based on the foregoing Findings of Fact, the Undersigned makes the following

Conclusions of Law

1. Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, who that there is no genuine issue as to any material fact and that any party is entitled to a

judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In making this determination, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

2. The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact, which may be satisfied by showing that the party cannot overcome an affirmative defense which would bar the claim. *Taylor v. Ashburn*, 112 N.C. App. 604, 606-607, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994).

3. The moving party meets this burden if it can show that an essential element of the nonmoving party's claim does not exist, or that the nonmoving party cannot produce evidence of an essential element of his claim, or cannot overcome an affirmative defense which would bar the claim. Once the party moving for summary judgment meets its burden, it is the nonmoving party's burden to produce a forecast of evidence showing that it will be able to establish at least a prima facie case at trial. *Forsyth Mem. Hosp. v. Armstrong World Indus., Inc.*, 122 N.C. App. 413, 470 S.E.2d 826 (1996).

4. Under the Tort Claims Act, the State has expressly waived its sovereign immunity in certain circumstances. N.C. Gen. Stat. §§ 143-291, 143-297. This waiver of immunity shall be strictly construed. *Floyd v. N.C. State Highway Comm'n*,, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955). The Industrial Commission has jurisdiction under N.C. Gen. Stat. § 143-291, et seq., to hear tort claims arising as a

result of the alleged negligence of an officer, employee, involuntary servant, or agent of the State while acting within the scope of his employment or agency, or authority under circumstances where the State, if a private person, would be liable to the Plaintiff under state laws. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

5. The question of whether an employer-employee relationship exists is jurisdictional. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E.2d 280 (1965). "An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the act." *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976). "When an inmate is injured while working at his prison job, his exclusive remedy for any injury is a workers' compensation claim . . . ." *Vereen v. N.C. Dep't of Corr.*, 168 N.C. App. 588, 608 S.E.2d 412 (2005).

6. In claims by employees involving injuries by accident arising out of and in the course of employment, and occupational illnesses allegedly contracted through employment, a plaintiff's exclusive remedy is to file a claim under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-10.1 (2006); See also *Ryles v. Durham Co. Hosp. Corp.*, 107 N.C. App. 455, 420 S.E.2d 487, *cert. denied*, 333 N.C. 169, 424 S.E.2d 406 (1992) (holding that college respiratory therapist student was limited to Workers' Compensation remedy in slip and fall at college).

7. Defendant has met its burden of proof by forecasting sufficient, competent evidence to show that Plaintiff was an employee of Defendant at the time he was allegedly exposed to a "harmful" indoor environment, which in turn allegedly caused him to sustain a respiratory illness.

8. Plaintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear Plaintiff's claim under the Tort Claims Act. Plaintiff has further failed to show there is a genuine issue as to a material fact.

9. Though the Undersigned makes no determination as to the merits of Plaintiff's claim, Plaintiff's exclusive remedy is to seek recourse under the North Carolina Workers' Compensation Act.

10. Plaintiff's Tort Claim should be dismissed with prejudice.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following . . . Decision and Order: , , , 1. Plaintiff's Tort Claim is dismissed with prejudice. . . . 2. Plaintiff shall pay the costs of this matter. , , , 3. This Tort Claim is taken off of the active docket.

/s/ WANDA BLANCHE TAYLOR

APPENDIX B

NORTH CAROLINA INDUSTRIAL COMMISSION

No. TA-19383

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT

DECISION AND ORDER

BEFORE THE FULL COMMISSION REVIEW PANEL, CHRISTOPHER SCOTT, PANEL CHAIRMAN AND COMMISSIONER, BUCK LATTIMORE, CHAIR AND COMMISSIONER, AND DIANNE C. SELLERS, COMMISSIONER

BY CHRISTOPHER SCOTT, COMMISSIONER

FILED AUGUST 10, 2007

Based upon all of the competent evidence of record and reasonable inferences flowing therefrom, the Full Commission makes the following

Findings of Fact

1. The Plaintiff filed his Tort Claim Affidavit, Form T-1, on December 30, 2005, with the Industrial Commission alleging, in pertinent part, that during September through November 2003, he was an employee and Resident Advisor for Defendant, and allegedly was exposed to a "substandard and unhealthy indoor environment, primarily mold, in Wood Hall".

2. The Defendant timely answered and moved to dismiss Plaintiff's tort claim on basis that it was barred by the North Carolina Workers' Compensation Act, and that Plaintiff's exclusive remedy was to file a Workers' Compensation claim.

3. The Defendant also filed a motion for summary judgment, which was heard before the [North Carolina Industrial Commission] on November 9, 2006.

4. Attached to Defendant's motion for summary judgment was a sworn Affidavit of Timothy S. Blair, Associate Director of University Housing for Defendant, with Exhibits. The sworn statements made by Mr. Blair in his Affidavit are found to be credible and competent evidence in a summary judgment proceeding.

5. Based upon the evidence of record, the Full Commission finds that the Plaintiff was employed with the Defendant as a Resident Advisor during the time period that the Plaintiff allegedly was exposed to a mold. The Full Commission further finds that the Plaintiff was compensated financially for residing in the residence hall where he allegedly was exposed to mold. Moreover, the Plaintiff would not have resided in Wood Hall but for his employment status as a Resident Advisor with Defendant.

6. The Full Commission finds that an employment relationship existed between the Plaintiff and the Defendant at the time Plaintiff was allegedly exposed to the allegedly "substandard and unhealthy indoor environment" set out in Plaintiff's Tort Claim Affidavit.

7. The Full Commission finds that the Plaintiff has not provided sufficient evidence to rebut the Defendant's contention that the Plaintiff was an employee of the Defendant at all relevant times.

Based on the foregoing Findings of Fact, the Full Commission reaches the following

Conclusions of Law

1. Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, who that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In making this determination, "the

evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

2. The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact, which may be satisfied by showing that the party cannot overcome an affirmative defense which would bar the claim. *Taylor v. Ashburn*, 112 N.C. App. 604, 606-607, 436 S.E.2d 276, 278 (1993), cert. denied, 336 N.C. 77, 445 S.E.2d 46 (1994). The moving party meets this burden if it can show that an essential element of the nonmoving party's claim does not exist, or that the nonmoving party cannot produce evidence of an essential element of his claim, or cannot overcome an affirmative defense which would bar the claim. Id. The defendant has met its burden of proof by forecasting sufficient, competent evidence to show that the plaintiff was an employee of the defendant at the time he was allegedly exposed to a "harmful" indoor environment, which in turn allegedly caused him to sustain a respiratory illness. Id.

3. Once the party moving for summary judgment meets its burden, it is the nonmoving party's burden to produce a forecast of evidence showing that it will be able to establish at least a prima facie case at trial. *Forsyth Mem. Hosp. v. Armstrong World Indus., Inc.*, 122 N.C. App. 413, 470 S.E.2d 826 (1996). The plaintiff has failed to forecast sufficient, competent evidence to rebut the defendant's evidence, and has failed to show that the Plaintiff

was not an employee of the defendant at the time of the alleged exposure. Id.

4. Under the Tort Claims Act, the State has expressly waived its sovereign immunity in certain circumstances. N.C. Gen. Stat. §§ 143-291, 143-297. This waiver of immunity shall be strictly construed. *Floyd v. N.C. State Highway Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955). The Industrial Commission has jurisdiction under N.C. Gen. Stat. § 143-291, et seq., to hear tort claims arising as a result of the alleged negligence of an officer, employee, involuntary servant, or agent of the State while acting within the scope of his employment or agency, or authority under circumstances where the State, if a private person, would be liable to the Plaintiff under state laws. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983). The plaintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear the plaintiff's claim under the Tort Claims Act. Id. The plaintiff has further failed to show there is a genuine issue as to a material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c).

5. The question of whether an employer-employee relationship exists is jurisdictional. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E.2d 280 (1965). "An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the act." *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976).

6. In claims by employees involving injuries by accident arising out of and in the course of employment, and occupational illnesses allegedly contracted through employment, a plaintiff's exclusive remedy is to file a claim under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-10.1 (2006); See also *Ryles v. Durham Co. Hosp. Corp.*, 107 N.C. App. 455, 420 S.E.2d 487, *cert. denied*, 333 N.C. 169, 424 S.E.2d 406 (1992) (holding that college respiratory therapist student was limited to Workers' Compensation remedy in slip and fall at college).

7. Based on the competent evidence of record, the Full Commission concludes that the plaintiff's present tort claim should be dismissed with prejudice. N.C. Gen. Stat. § 143-291 et seq. Though the Full Commission makes no determination as to the merits of the Plaintiff's claim, the Full Commission concludes that the Plaintiff's exclusive remedy is to seek recourse under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-1 et seq. The Plaintiff shall be granted leave to duly file a workers' compensation claim pursuant to the Workers' Compensation Act within one year of the entry of this Order. Id.

8. Plaintiff's Tort Claim should be dismissed with prejudice.

Based on the foregoing Findings of Fact and Conclusions of Law, the Full Commission enters the following

Order:

1. The Plaintiff's Tort Claim must be, and is hereby, dismissed with prejudice.

2. The Plaintiff is hereby granted leave to duly file a workers' compensation claim with the Industrial Commission pursuant to the N.C. Workers' Compensation Act within one year of the entry of this Order.

3. Plaintiff shall pay the costs of this matter.

This the 23rd day of July 2007.

/s/ CHRISTOPHER SCOTT

CONCURRING:

/s/ BUCK LATTIMORE

/s/ DIANNE C. SELLERS

APPENDIX C

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA P07-907

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT-PETITIONER

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE-RESPONDENT

ORDERS

BEFORE THE
COURT OF APPEALS OF NORTH CAROLINA

FILED NOVEMBER 14, 2007

The petition filed in this cause on the 30th day of October 2007 and designated "Petition for Writ of Mandamus" is denied.

The petition filed in this cause on the 30th day of October 2007 and designated "Petition for Prohibition" is denied.

The petition filed in this cause on the 30th day of October 2007 and designated "Petition for Writ of Supersedeas" is denied.

By order of the Court this the 14th day of November 2007.

[Orders certified by]

/s/ JOHN H. CONNELL
CLERK OF [COURT] . . .
NORTH CAROLINA COURT OF APPEALS

APPENDIX D

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE

OPINION

BEFORE
TYSON, MCCULLOUGH and STROUD, Judges

BY TYSON, Judge

FILED MAY 20, 2008

Appeal by plaintiff from decision and order entered 10 August 2007 by Commissioner Christopher Scott for the North Carolina Industrial Commission.

Heard in the Court of Appeals 1 May 2008. [Appearances are] Joseph Kamau Christopher Bey, pro se, for plaintiff-appellant [and] Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the defendant-appellee.

J. Kamau Christopher ("plaintiff") appeals from the Full Commission of the North Carolina Industrial Commission's ("the Commission") order dismissing his tort claim action against North Carolina State University ("defendant"). We affirm.

I. Background

Plaintiff was enrolled as a student at North Carolina State University from August 1999 to May 2004. In July 2002, plaintiff enlisted in the U.S. Naval Reserve and attained the status of serving as an Active Duty member in the Nuclear Propulsion Officer Candidate Program. Plaintiff's initial enlistment physical revealed he was "fit for full service." In August 2002, plaintiff was hired as a Resident Advisor for Wood Residence Hall ("Wood Hall") for the 2002-2003 term. Plaintiff was subsequently rehired as Resident Advisor for the following 2003-2004 term. On 18 September 2003, plaintiff resigned from his position due to "mold and mildew growing in visible areas in the living space of residents [sic] and a lack of responsiveness from the University Administration[.]" In November 2003, plaintiff was diagnosed with a permanent asthmatic and respiratory condition. Despite these medical

conditions, plaintiff was granted a waiver by the Navy Recruiting Command. After graduation, plaintiff was transferred to the Naval Air Station in Pensacola, Florida. Upon plaintiff's arrival, a commissioning physical was conducted, plaintiff's medical waiver was revoked, and further analysis of plaintiff's medical condition and fitness to serve was ordered.

Such analysis revealed plaintiff's respiratory condition had further progressed. On 5 May 2005, the Navy Medical Command Physical Evaluation Board issued an order finding plaintiff had acquired a medical condition, asthma, which was a physically disqualifying factor. Plaintiff was released from his military obligation with an honorable discharge, which terminated his commitment five years early.

On 30 December 2005, plaintiff filed an affidavit under the Tort Claims Act alleging he was damaged in the amount of $150,000.00 from "exposure to substandard and unhealthy indoor environment" while he was employed as a Resident Advisor in Wood Hall. On 9 March 2006, defendant filed a motion to dismiss and answer. Defendant asserted plaintiff alleged he was injured while employed with defendant and therefore his exclusive remedy was to assert a claim under the North Carolina Workers' Compensation Act.

On 20 July 2006, defendant filed a motion for summary judgment. Plaintiff filed a response to defendant's motion for summary judgment and asserted plaintiff's injury "did not arise out of and in the course of employment, nor is the injury compensable under the North Carolina Workers' Compensation Act, and thus the Plaintiff . . . can only seek compensation for damages under the Tort

Claims Act as filed." On 9 February 2007, Deputy Commissioner Wanda Taylor filed an order dismissing plaintiff's tort claim with prejudice and entered the following conclusions:

> 7. Defendant has met its burden of proof by forecasting sufficient, competent evidence to show that Plaintiff was an employee of Defendant at the time he was allegedly exposed to a "harmful" indoor environment, which in turn allegedly caused him to sustain a respiratory illness.
>
> 8. Plaintiff has failed to forecast sufficient, competent evidence to rebut Defendant's evidence, and has failed to show that Plaintiff was not an employee of Defendant at the time of the alleged exposure.
>
> 9. Plaintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear Plaintiff's claim under the Tort Claims Act. Plaintiff has further failed to show there is a genuine issue as to a material fact.

On 10 August 2007, the Full Commission affirmed the Deputy Commissioner's order and dismissed plaintiff's tort claim with prejudice. Plaintiff appeals.

II. Issues

Plaintiff argues the Industrial Commission erred by: (1) failing to make findings of fact concerning all crucial issues, including the alleged injury; (2) hearing defendant's motion for summary judgment and finding no genuine issues of material fact exist; and (3) dismissing plaintiff's tort claim based upon the assertion that a claim under the North Carolina Workers' Compensation Act was plaintiff's exclusive remedy.

III. Standard of Review

[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (internal quotations omitted). However, our Supreme Court has repeatedly held "that jurisdictional facts found by the Industrial Commission, even when supported by competent evidence, are not binding upon the courts on appeal, and that the reviewing court has the duty to make its own independent findings." *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citations omitted).

IV. Subject Matter Jurisdiction

The dispositive issue before us is whether the North Carolina Workers' Compensation Act provides plaintiff his exclusive remedy for his alleged injury and divests the Industrial Commission of subject matter jurisdiction to adjudicate plaintiff's tort claim.

The determinative factor that subjects the parties to the provisions of the North Carolina Workers' Compensation Act is whether an employee-employer relationship exists. *Cox v. Transportation Co.*, 259 N.C. 38, 42, 129 S.E.2d 589, 592 (1963); see also *Askew v. Tire Co.*, 264 N.C. 168, 170, 141 S.E.2d 280, 282 (1965) ("The question whether the employer-employee relationship exists is clearly jurisdictional.").

Here, plaintiff conceded numerous times in his pleadings and before the Industrial Commission that he was an employee of defendant while he attended classes during the 2002-2003 school term and briefly for the 2003-2004 term. Plaintiff specifically states in his Response to Defendant's Motion for Summary Judgment, "Plaintiff admits and acknowledges that his relationship with the Defendant included a employer-employee arrangement, as defined by the Statutes, and thus he was employed with the Defendant during a period in which the alleged injury manifested itself[] . . . ."

It is well settled in this jurisdiction that the North Carolina Workers' Compensation Act is the exclusive remedy when an employee is injured by accident arising out of and in the course and scope of employment. *Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002) (citing N.C. Gen. Stat. § 97-10.1).

Because the North Carolina Workers' Compensation Act is plaintiff's exclusive remedy for

the alleged injury that occurred during his employment, the Industrial Commission properly dismissed plaintiff's tort claim with prejudice. This assignment of error is overruled. In light of our holding, it is unnecessary to address plaintiff's remaining assignments of error.

V. Conclusion

The North Carolina Workers' Compensation Act provides plaintiff's exclusive remedy for his alleged injury that arose out of and in the course and scope of employment. The Industrial Commission's order dismissing plaintiff's tort claim with prejudice is affirmed.

Affirmed.

Judges MCCULLOUGH and STROUD concur.

APPENDIX E

SUPREME COURT OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. 246-P07

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT-PETITIONER

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE-RESPONDENT

ORDERS

BEFORE
SUPREME COURT OF NORTH CAROLINA

BY HUDSON, JUDGE

FILED SEPTEMBER 4, 2008

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff on the 30th day of May 2008 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is "Allowed by order of the Court in conference, this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

Upon consideration of the petition filed on the 30th day of May 2008 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: "Denied by order of the Court in conference, this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

Upon consideration of the petition filed by Plaintiff on the 30th day of May 2008 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals: "Denied by order of the Court in conference, this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

The following order has been entered on the motion filed on the 22nd day of August 2008 by Plaintiff for Temporary Stay: "Motion Denied by order of the Court in conference this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

The following order has been entered on the motion filed on the 22nd day of August 2008 by Plaintiff to Amend the Record on Appeal: "Motion Denied by order of the Court in conference this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

The following order has been entered on the motion filed on the 22nd day of August 2008 by Plaintiff to Expedite Appeal: "Motion Denied by order of the Court in conference this the 26th day of August 2008. /s/ Hudson, J.; [f]or the Court."

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of September 2008.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina
/s/ SHAULA A. BRANNAN
Assistant Clerk

APPENDIX F

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE

RECORD ON APPEAL

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED DECEMBER 14, 2007

INDEX

[Index Item Number] 1. Statement of Organization of Trial. [Page] 1

[Index Item Number] 2. Statement of Jurisdiction. [Page] 1

[Index Item Number] 3. Statement of Appeal Bond. [Page] 1

[Index Item Number] 4. Affidavit of Claim, Form T-1, filed with the North Carolina Industrial Commission on 30 December 2005. [Page] 2

[Index Item Number] 5. Letter from the North Carolina Industrial Commission to Plaintiff dated 3 January 2006. [Page] 4

[Index Item Number] 6. Defendant's Motion to Dismiss and Answer, filed and served 9 March 2006. [Page] 6

[Index Item Number] 7. Defendant's Motion for Summary Judgment and Motion to Suspend Discovery, with Supporting Affidavit and Exhibits, filed and served 20 July 2006. [Page] 10

[Index Item Number] 8. Plaintiff's Response to the Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion to Compel, with Supporting Affidavit and List of Exhibits, filed and served 11 August 2006. [Page] 32

[Index Item Number] 9. Exhibit A to the Plaintiff's Response to Defendant's Motion for Summary

Judgment, Administrative Memorandum submitted by Plaintiff to representative of the Defendant, former Wood Hall Resident Director Matthew P. Long of the Department of University Housing, dated 8 October 2002. [Page] 62

[Index Item Number] 10. Exhibit B to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Article entitled Dorm mold concerns students: Students allege mold caused health problems in dorms, published in the Technician, a student publication of North Carolina State University, authored by Benjamin Akroyd dated 17 September 2003. [Page] 64

[Index Item Number] 11. Exhibit C to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Letter of Resignation from Employment from Plaintiff to Defendant delivered 18 September 2003. [Page] 66

[Index Item Number] 12. Exhibit D to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Article entitled University Housing responds to students' mold complaints: Administration speaks out after students allege mold was found in their rooms, published in the Technician, a student publication at North Carolina State University, authored by Benjamin Akroyd dated 24 September 2003. [Page] 67

[Index Item Number] 13. Exhibit F to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Letter sent to Plaintiff from the Epidemiology Section of the Division of Public Health

in the North Carolina Department of Health and Human Services, signed by Pat Curran, CIH, Manager of the Health Hazards Control Unit and noted as a response on behalf of the Office of the Governor, the Honorable Michael Easley, dated 20 January 2004. [Page] 69

[Index Item Number] 14. Exhibit G to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Memorandum entitled "Disability Evaluation Findings of the Physical Evaluation Board (PEB) in the case of OC Joseph K Bey, USN" authored by the Secretary of the Navy Council of Review Boards, Department of the Navy dated 5 May 2005. [Page] 70

[Index Item Number] 15. Exhibit H to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Department of Defense Form 214 (DD214), Certificate of Release or Discharge from Active Duty, issued by the Navy Bureau of Personnel for the discharge of the Plaintiff dated 9 June 2005. [Page] 74

[Index Item Number] 16. Exhibit J to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Plaintiff's Response to the Defendant's First Set of Interrogatories and Request for Production of Documents served 1 May 2006. [Page] 75

[Index Item Number] 17. Exhibit K to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant served 1 May 2006. [Page] 108

[Index Item Number] 18. Exhibit Q to the Plaintiff's Response to Defendant's Motion for Summary Judgment, Article entitled Students, administrators discuss indoor air quality, published in the Technician, a student publication of North Carolina State University, authored by Rachael Rogers dated 21 January 2004. [Page] 128

[Index Item Number] 19. Exhibit R to the Plaintiff's Response to Defendant's Motion for Summary Judgment, North Carolina State University Facility Profile and Ten-Year Capital Plan dated December 1999, which is primarily cited as a reference, as this document is public record, but a copy of which is included as an Exhibit for the convenience of the North Carolina Industrial Commission. [Page] 130

[Index Item Number] 20. Order issued by the Honorable Wanda Blanche Taylor, Deputy Commissioner, North Carolina Industrial Commission, filed and served 14 November 2006. [Page] 176

[Index Item Number] 21. Plaintiff's Response to the Defendant's Motion for Summary Judgment and Motion to Suspend Discovery and Cross-Motion to Compel, and Proposed Decision and Order, filed and served 14 December 2006. [Page] 177

[Index Item Number] 22. Defendant's Proposed Decision and Order filed and served 14 December 2006. [Page] 214

[Index Item Number] 23. Order issued by the Honorable Wanda Blanche Taylor, Deputy

Commissioner, North Carolina Industrial Commission, filed and issued 30 January 2007. [Page] 219

[Index Item Number] 24. Decision and Order and Order of Dismissal, issued by the Honorable Wanda Blanche Taylor, Deputy Commissioner, North Carolina Industrial Commission, Raleigh, North Carolina, filed and issued 9 February 2007. [Page] 220

[Index Item Number] 25. Plaintiff's Notice of Appeal of the Decision and Order and Order of Dismissal, issued by the Honorable Wanda Blanche Taylor, Deputy Commissioner, filed and served 20 February 2007. [Page] 224

[Index Item Number] 26. Letter from the North Carolina Industrial Commission to Plaintiff dated 22 February 2007. [Page] 226

[Index Item Number] 27. Notice of Appeal and Application for Review, Form T-44, Plaintiff's Legal Brief, Questions of Law and Assignments of Error in Support of Appeal of the Decision and Order and Order to Dismiss of Wanda Blanche Taylor, Deputy Commissioner, filed and served 19 April 2007. [Page] 227

[Index Item Number] 28. Order by the Honorable Buck Lattimore, Chairman and Commissioner, North Carolina Industrial Commission, filed and issued 26 April 2007. [Page] 251

[Index Item Number] 29. Defendant's Reply Brief to the Full Commission, filed and served 29 May 2007. [Page] 252

[Index Item Number] 30. Decision and Order and Order of Dismissal issued by the Full Commission of the North Carolina Industrial Commission, the Honorable Christopher Scott, Commissioner and Chair, the Honorable Buck Lattimore, Commissioner and Chairman, and the Honorable Diane Sellers, Commissioner, presiding, filed and issued 10 August 2007. [Page] 262

[Index Item Number] 31. Plaintiff's Notice of Appeal from the Decision and Order and Order of Dismissal issued by the Full Commission of the North Carolina Industrial Commission, the Honorable Christopher Scott, Commissioner and Chair, the Honorable Buck Lattimore, Commissioner and Chairman, and the Honorable Diane Sellers, Commissioner, presiding, filed and served 10 September 2007. [Page] 268

[Index Item Number] 32. Letter from the North Carolina Industrial Commission to Plaintiff dated 24 September 2007. [Page] 270

[Index Item Number] 33. Plaintiff's Proposed Record on Appeal to Defendant, served 10 October 2007. [Page] 271

[Index Item Number] 34. Plaintiff's Motion for Extension of Time to Order the Transcript and Plaintiff's Notice of Order of Transcript, filed and served 10 October 2007. [Page] 274

[Index Item Number] 35. Plaintiff's Petition for Writ of Mandamus and Prohibition, Petition for Writ of Supersedeas and Incorporated Petition for Immediate Change of Venue and New Trial to the North Carolina Court of Appeals filed and served 30 October 2007. [Page] 280

[Index Item Number] 36. Letter from the Honorable Pamela Young, Chairwoman and Commissioner, North Carolina Industrial Commission, to the Plaintiff, postmarked 5 November 2007. [Page] 281

[Index Item Number] 37. Orders on Plaintiff's Petition for Writ of Mandamus and Prohibition, Petition for Writ of Supersedeas by the North Carolina Court of Appeals filed and issued 14 November 2007. [Page] 283

[Index Item Number] 38. Plaintiff's Motion for Intervention to Settle the Record to the North Carolina Industrial Commission, filed and served 21 November 2007. [Page] 286

[Index Item Number] 39. Order by the Honorable Danny Lee McDonald, Commissioner, North Carolina Industrial Commission filed and issued 10 December 2007. [Page] 289

[Index Item Number] 40. Statement of Verbatim Transcript of Proceedings. [Page] 291

[Index Item Number] 41. Stipulation of Service and Settlement of Record on Appeal in the matter of J. Kamau Christopher a/k/a Joseph Kamau Christopher Bey v. North Carolina State University,

Tort Claim, North Carolina Industrial Commission, File No. TA-19383 by and between the Plaintiff and Defendant, dated 13 December 2007. [Page] 292

[Index Item Number] 42. Assignments of Error for Appeal. [Page] 293

[Index Item Number] 43. Identification of Counsel for the Appeal. [Page] 298

[Index Item Number] 44. Certificate of Filing and Service of Record on Appeal. [Page] 299

STATEMENT OF ORGANIZATION OF TRIAL COURT

From the 19 July 2007 Review and Appeal Session for the Full Commission of the North Carolina Industrial Commission, Raleigh, North Carolina, the Honorable Christopher Scott, Commissioner and Chair, the Honorable Buck Lattimore, Commissioner and Chairman, and the Honorable Diane Sellers, Commissioner, presiding. From 10 August 2007 Decision and Order and Order of Dismissal dismissing the Plaintiff's Claim without prejudice, the plaintiff appealed.

The record of appeal was filed in the Court of Appeals on 14 December 2007, and was docketed on 18 December 2007.

STATEMENT OF JURISDICTION

This action was commenced by the filing of an Affidavit of Claim under the North Carolina Tort Claims Act, Form T-1, on 30 December 2005, with

the North Carolina Industrial Commission. The North Carolina General Statutes provide that proper jurisdiction for Tort Claims against the State, or any subdivision thereof, rest with the North Carolina Industrial Commission, and the proper jurisdiction from appeals therefrom rests with the North Carolina Court of Appeals. Defendant timely answered and moved to dismiss Plaintiff's Claim on the basis that it was barred by the exclusivity provisions of the North Carolina Workers' Compensation Act, Statute of Limitations and Repose, and Contributory Negligence, which Certificate of Service is dated 9 March 2006. There is no agreement between the parties on the issue of the competent and proper subject-matter jurisdiction of the North Carolina Industrial Commission in this matter.

STATEMENT OF APPEAL BOND

The North Carolina Industrial Commission has not set a monetary amount for an appeal bond due to the North Carolina Industrial Commission for this appeal. The standard appeal bond due to the North Carolina Court of Appeals is in the amount of TWO HUNDRED FIFTY ($250.00) DOLLARS.

STATEMENT OF TRANSCRIPT

Per Appellate Rule 9(c), the transcript of the entire proceedings in this case, prepared and certified by Susan V. Thomas, Notary Public, of Graham Erlacher & Associates, for the hearing held 9 November 2006, consisting of sixteen (16) pages,

numbered 1 through 16, bound in one volume, is filed contemporaneously with this record (T pp. 1-16).

The Plaintiff requested an order of the transcript for the hearing held before the Full Commission of the North Carolina Industrial Commission, the Honorable Christopher Scott, Commissioner and Chair, the Honorable Buck Lattimore, Commissioner and Chairman, and the Honorable Diane Sellers, Commissioner, presiding, on 19 July 2007 (R pp. 274-279), however, no court reporter was present to document the record or take audio of the hearing (R pp. 281-282).

No other requests for verbatim transcript of these proceedings were made by either party hereto and there are no other hearings, depositions or testimony was taken on record.

STIPULATION OF SERVICE AND SETTLEMENT OF THE RECORD ON APPEAL

The parties hereto represent and warrant as follows:

1. The Plaintiff Appellant's Proposed Record on Appeal was duly served on 10 October 2007, within the statutory time limit established.

2. Objections were duly served on 26 October 2007. The certificate showing service of the objections is omitted from the settled record.

3. These proceedings were stayed from 30 October 2007, upon the filing of the Plaintiff's Petition for Writ Mandamus, Prohibition and Supersedeas to the North Carolina Court of Appeals,

until 14 November 2007, the Orders from the North Carolina Court of Appeals denying all three petitions.

4. The Plaintiff Appellant timely requested a settlement conference from the North Carolina Industrial Commission on 21 November 2007. The Honorable Danny Lee McDonald, Commissioner, North Carolina Industrial Commission set a hearing on 3 December 2007 for settling the record. The order therefrom and this corresponding stipulation are dated thereafter.

5. All captions, signatures, headings of papers, certificates of service and documents filed with the trial court that are not necessary for an understanding of the appeal may be omitted from the record, except as required by Rule 9 of the Rules of Appellate Procedure.

6. The foregoing (R pp. 2-289), including the transcript described in the Statement of Verbatim Transcript of Proceedings (T pp. 1-16) accompanying this record, constitutes the final Record on Appeal upon mutual agreement of counsel for the parties hereto.

This 12th day of December, 2007.

PLAINTIFF-APPELLANT
/s/ JOSEPH KAMAU CHRISTOPHER BEY
[Pro Se]

DEFENDANT-APPELLEE
/s/ DAHR JOSEPH TANOURY

[By Attorney General of North Carolina]

ASSIGNMENTS OF ERROR

The Plaintiff assigns as error:

1. The failure of the Commission to make explicit and conclusive findings of fact on every crucial issue, included the alleged injury of the Plaintiff, and to explicitly and conclusively find that the evidence presented shows the injury arose by accident out of and in the course of the employment with Defendant, and resulted in a compensable disability. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15.

2. The failure of the Commission to acknowledge that the law requires a finding of fact as to the alleged injury in question to be made in every claim, or pleading, brought forth under the exclusivity provisions of the North Carolina Workers' Compensation Act and that the standard of review requires the alleged injury to arise by accident out of and in the course of the employment and result in a compensable disability in order for the parties to be the subject to and in compliance with the North Carolina Workers' Compensation Act, and for the provisions thereof to apply. R pp. 220-223, 227-250, 262-267. T pp. 2-15.

3. The Commission's Finding of Fact #4, which found the sworn statements presented in the Affidavit of Timothy S. Blair to be "credible and competent evidence in this summary judgment proceeding", making no reference to evidence presented by the Plaintiff contending and objecting

to the admission of these statements on the grounds of questionable character and the standard of evidence for expert testimony. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15.

4. The Commission's Conclusion of Law #2 and Conclusion of Law #4, which concluded that the "Defendant has met the burden of proof by forecasting sufficient and competent evidence to show that the [P]laintiff was an employee of the [D]efendant at the time he was allegedly exposed to a 'harmful' indoor environment, which in turn allegedly caused him to sustain a respiratory illness" and "[t]he [P]laintiff has further failed to show there is a genuine issue as to a material fact", despite the suspension of discovery proceedings to reveal further evidence as to the nature of the allege injury, and an absence of sufficient, competent, conclusive and substantiating evidence as to the connection and correlation between the employment and the alleged injury to support the conclusion, and that said absence presents a genuine issue of material fact. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15.

5. The Commission's Conclusion of Law #3 and Conclusion of Law #4, which concluded that the "[P]laintiff has failed to forecast sufficient, competent evidence to rebut the [D]efendant's evidence, and has failed to show that the [P]laintiff was not an employee of the [D]efendant at the time of the alleged exposure" and "[t]he [P]laintiff has further failed to show there is a genuine issue as to a material fact", despite legal argument presented by the Plaintiff which asserts that the foregoing is not

the standard of review for the North Carolina Worker's Compensation Act and that the Defendant never fulfilled the burden of proof to show that the alleged injury "arose by accident out of and in the course of" the employment with Defendant and that same presents a genuine issue of material fact. R pp. 227-250, 262-267. T pp. 2-15.

6. The Commission's Conclusion of Law #4, which concluded that the "[P]laintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear the [P]laintiff's claim under the Tort Claims Act" and "[t]he [P]laintiff has further failed to show there is a genuine issue as to a material fact", despite legal argument presented by the Plaintiff which asserts that the Defendant never fulfilled the burden of proof to show that the Plaintiff and Defendant were subject to and complied with the provisions of the North Carolina Workers' Compensation Act, and, thus, the exclusivity provisions apply. R pp. 227-250, 262-267. T pp. 2-15.

7. The Commission's Conclusion of Law #6 and the Commission's Conclusion of Law #7, which concluded that "In claims by employees involving injuries by arising out of and in the course of the employment, the claimant's exclusive remedy is to file a claim under the North Carolina Workers' Compensation Act" and "the [P]laintiff's exclusive remedy is to seek recourse under the North Carolina Workers' Compensation Act" without making explicit and conclusive findings of fact as to the alleged injury of the Plaintiff. R pp. 227-250, 262-267. T pp. 2-15

8. The Commission disregarded the Plaintiff's legal argument, together with supporting sufficient and competent evidence, to show that the alleged injury of the Plaintiff did not arise by accident out of and in the course of the employment with Defendant and thus the Plaintiff and Defendant were not subject, nor complied with, the provision of the North Carolina Workers' Compensation Act, and the Act, and the exclusivity provisions thereof, do not apply. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15

9. The Commission disregarded the Plaintiff's legal argument, together with supporting sufficient and competent evidence, to show that the injury did not arise from the employment relationship whereas the Plaintiff was a student using facilities maintained by the Defendant and the Plaintiff was a tenant of facilities maintained by the Defendant before, during and after employment, and said facilities are the alleged primary direct and proximate cause of the injury in question. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15

10. The Commission disregarded the Plaintiff's legal argument, together with supporting sufficient and competent evidence, to show that the alleged injury of the Plaintiff is not compensable under the North Carolina Workers' Compensation Act where the alleged injury did not result in a disability, which is defined as an inability to earn wages at the time of the injury in the same or any other employment. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15

11. The Commission disregarded the Plaintiff's legal argument, together with supporting sufficient and competent evidence, to show that the alleged injury of the Plaintiff is one which the general public is equally exposed, and thus there is no statutory correlation or relationship for the purposes of the North Carolina Workers' Compensation Act or grounds to conclude that the parties hereto are subject to the Workers' Compensation Act. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15

12. The Commission disregarded the Plaintiff's legal argument, together with supporting sufficient and competent evidence, to show that the Defendant was guilty of gross negligence and intentional misconduct which the Defendant knew was substantially certain to cause serious injury or death to the Plaintiff and others similarly situated, and that the Plaintiff was allegedly injured due to the gross negligence and intentional misconduct of the Defendant, and the gross negligence and intentional misconduct of the Defendant was the direct and proximate cause of the alleged injury to the Plaintiff. R pp. 32-175, 177-213, 220-223, 227-250, 262-267. T pp. 2-15

13. The Commission, given the alleged genuine issue of material fact and triable issues of fact present in the instant case, erred in hearing the Defendant's Motion for Summary Judgment while the Plaintiff was seeking discovery in order to obtain evidence in order to address these claims. R pp. 177-213, 227-250, 262-267. T pp. 2-15

14. The Commission's Conclusion of Law #6 and the Commission's Conclusion of Law #7, whereas the Commission failed to explicitly find the evidence presented sufficient and competently shows that the four (4) elements of a claim of a member of the class subject to the Workers' Compensation Act are present and controlling, and in full force and effect, the Commission failed to find adequate grounds to conclude that the Plaintiff is a member of the class subject to the Workers' Compensation Act. R pp. 177-213, 227-250, 262-267. T pp. 2-15

15. The Commission's Conclusion of Law #6 and Conclusion of Law #7, whereas failure of the Commission to strictly and explicitly find that the Plaintiff is a member of the class subject to and in compliance with the North Carolina Workers' Compensation Act is a violation of principles of equal protections explicitly incorporated into the Fourteenth Amendment of the United States of America and Article I, Section 19 of the Constitution of North Carolina, whereby all persons similarly situated must have equal protection under the law. R pp. 177-213, 227-250, 262-267. T pp. 2-15.

APPENDIX G

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE

PLAINTIFF-APPELLANT'S
BRIEF IN SUPPORT OF APPEAL, AND
APPEAL INFORMATION STATEMENT

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED DECEMBER 28, 2007

QUESTIONS PRESENTED

I. DOES THE STANDARD OF REVIEW FOR ANY JUDICIAL AUTHORITY TO DENY THE RIGHT OF A PARTY TO MAINTAIN A COMMON LAW CLAIM FOR CIVIL REMEDY PURSUANT TO THE WORKERS' COMPENSATION ACT REQUIRE ANY PRESIDING JUDICIAL AUTHORITY TO MAKE FINDINGS OF FACT AS TO ALL CRUCIAL ISSUES, INCLUDING THE ALLEGED INJURY IN QUESTION?

II. DID THE NORTH CAROLINA INDUSTRIAL COMMISSION ERR IN HEARING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHILE THE PLAINTIFF WAS SEEKING DISCOVERY RESPONSES?

III. DID THE CLAIMANT PRESENT SUFFICIENT AND COMPETENT EVIDENCE TO SHOW THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AND TRIABLE ISSUES OF FACT?

IV. DID THE CLAIMANT PRESENT SUFFICIENT AND COMPETENT EVIDENCE TO SHOW THAT THE ALLEGED INJURY IS NOT COMPENSABLE UNDER THE WORKERS' COMPENSATION ACT?

V. DID THE NORTH CAROLINA INDUSTRIAL COMMISSION ERR IN DISREGARDING EVIDENCE PRESENTED BY THE CLAIMANT TO SHOW THAT THE CLAIMANT IS NOT SUBJECT TO THE WORKERS' COMPENSATION ACT?

VI. MUST THE CLAIMANT BE ELIGIBLE TO RECEIVE COMPENSATION FOR AN ALLEGED INJURY BEFORE THE PROVISIONS OF THE WORKERS' COMPENSATION ACT APPLY TO EXCLUDE ALL OTHER REMEDIES UNDER THE LAW?

VII. DID THE NORTH CAROLINA INDUSTRIAL COMMISSION ERR AND VIOLATE THE FOURTEENTH AMENDMENT OF THE UNITED STATES DENYING THE CLAIMANT THE RIGHT TO MAINTAIN A COMMON LAW CLAIM FOR CIVIL REMEDY?

STATEMENT OF THE CASE

J. Kamau Christopher a/k/a Joseph Kamau Christopher Bey (the "Plaintiff") commenced this action against North Carolina State University (the "Defendant") by the filing of an Affidavit of Tort Claim with the North Carolina Industrial Commission (the "Commission") on 30 December 2005 (R pp. 2-3). On 9 March 2006, the Defendant filed an Answer and Motion to Dismiss (R pp. 6-9). On 20 July 2006, the Defendant also filed a Motion for Summary Judgment moving the Commission to dismiss this claim (R pp. 10-31). The matter was heard before the Honorable Wanda Blanche Taylor, Deputy Commissioner, on 9 November 2006, and was also heard before the Full Commission Panel, the Honorable Christopher Scott, Chair and Commissioner, the Honorable Buck Lattimore, Chairman and Commissioner, and Dianne Sellers, Commissioner, presiding, on 19 July 2007 (R pp. 220-

223, 262-267, 274-279, 281-282, 291; T pp. 1-14). The Commission ruled in favor of the Defendant and a final judgment and order dismissing the claim was entered by the Commission on 10 August 2007 (R pp. 262-267). The Plaintiff filed and served a notice of appeal to the Honorable North Carolina Court of Appeals on 10 September 2007 (R pp. 268-269). The record was settled by order of the court entered 10 December 2007 and confirmed by stipulation between the Plaintiff and Defendant dated 13 December 2007 (R pp. 289-290, 292). The record was filed with the Clerk of the North Carolina Court of Appeals on 14 December 2007, docketed 14 December 2007 and the printed record was served upon all parties on 18 December 2007.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The judgment and order entered by the Full Commission Panel, by the Honorable Christopher Scott, Commissioner and Chair, the Honorable Buck Lattimore, Commissioner and Chairman, and the Honorable Diane Sellers, Commissioner, presiding, of the Commission is a final judgment, therefore, appellate review rests with the North Carolina Court of Appeals pursuant to N.C. Gen. Stat. §7A-27(b).

STATEMENT OF THE FACTS

The Plaintiff enrolled as a student at the university maintained by Defendant in August 1999 (R pp. 58-60). In December 1999, the Defendant published a Facility Profile and Ten-Year Capital Plan (R pp. 130-175). The documentation disclosed

that the deficiencies and health and safety code violations present in the facilities owned, operated and maintained by the Defendant presented risks and hazards to student, staff and faculty alike (R pp. 155-157). Said documentation further stated that these risks and hazards include asbestos, lead paint and environmental hazards (R pp. 155-157). From January 2001 until May 2001, the Plaintiff resided Metcalf Hall, a facility maintained by Defendant (R pp. 58-60, 80-86). In October 2001, the Plaintiff suffered from a respiratory infection from an unknown cause (R pp. 58-60, 80-86). On 19 July 2002, Plaintiff enlisted with the United States Navy in the Reserve Corps (R pp. 58-60, 70-74, 80-86).

On 9 August 2002, the Plaintiff commenced a period of residency and tenancy in facilities maintained by Defendant and Plaintiff commenced employment as a temporary employee, Resident Advisor, with Defendant at Wood Hall (R pp. 58-60, 80-86). In September 2002, the Plaintiff was again diagnosed with a respiratory infection, however, this condition was severe and persistent until September 2003 (R pp. 58-60, 80-86). The Plaintiff began to experience a severe shortness of breath, asthmatic conditions and rhinitis (R pp. 58-60, 80-86). After completion of a personal investigation, the medical experts and the Plaintiff discovered reason to believe the adverse health conditions were caused by conditions present in the facilities maintained by the Defendant (R pp. 58-60, 80-86). Immediately thereafter, the Plaintiff notified Defendant of the conclusions of his personal investigation (R pp. 58-60, 62-63, 80-86). The Defendant immediately made efforts to remedy the alleged conditions causing such adverse health conditions (R pp. 58-60, 80-86). In

May 2003, the Plaintiff continued employment and tenancy with the Defendant by transfer to Metcalf Hall (R pp. 58-60, 80-86). During said summer, extremely heavy rainfall cause flooding in numerous facilities owned, operated and maintained by the Defendant (R pp. 58-60, 80-86). In August 2003, the Plaintiff continued employment and tenancy with the Defendant by transfer back to Wood Hall (R pp. 58-60, 80-86). The water damage caused the presence of environmental hazards, namely mold, to be present in numerous facilities maintained by the Defendant, including Wood Hall (R pp. 58-60, 80-86). A dispute arose between the Plaintiff and the Defendant regarding the actions of the Defendant addressing conditions present in facilities maintained by the Defendant (R pp. 58-60, 64-65). Shortly thereafter, the Plaintiff resigned from his position of employment and vacated the premises terminating his tenancy effective 18 September 2003 (R p. 66). Persistence of the adverse health conditions after termination of employment and tenancy led the medical experts to believe the condition to be permanent in November 2003 (R pp. 58-60, 70-74, 80-86). In December 2003, the Plaintiff presented documentation as evidence of the failure of the Defendant to safeguard student, staff and faculty health against risks and hazards present in facilities maintained by the Defendant to the Honorable Michael F. Easley, Governor of North Carolina (R pp. 58-60, 80-86). On 20 January 2004, the North Carolina Department of Health and Human Services confirmed receipt of said documentation on behalf of the Governor of North Carolina (R p. 69). On 20 January 2004, the Plaintiff met with certain agents and officers of the Defendant regarding these claims

without any mutual agreement of publication of a plan of action to address the concerns (R pp. 128-129).

The Plaintiff graduated from the university maintained by Defendant in May 2004 (R pp. 58-60). In November 2004, the Plaintiff was transferred to the Naval Air Station in Pensacola, Florida for Navy Officer Candidate School (R pp. 58-60, 70-74, 80-86). A full medical examination conducted immediately after the transfer, and subsequent medical examination, found the Plaintiff unfit for military service, with official findings issued on 5 May 2005 (R pp. 70-73). The Plaintiff was discharged from the United States Navy on 9 June 2005 (R p. 74). The enlistment contract was terminated five (5) years early (R pp. 58-60, 70-74, 80-86). The Plaintiff lost the associated employment benefits, including salary, additional compensation, bonuses and hazard pay, subsidized health insurance and life insurance, subsidized tuition assistance programs and the integrated subsidized educational assistance program (R pp. 86-87).

LEGAL ARGUMENT

I. THE COMMISSION FAILED TO UPHOLD THE STANDARD OF REVIEW REQUIRING EXPLICIT AND CONCLUSIVE FINDINGS OF FACT ON EVERY CRUCIAL ISSUE, INCLUDING THE ALLEGED INJURY OF THE PLAINTIFF.

ASSIGNMENT OF ERROR No. 1; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR No. 2; R pp. 220-223, 262-267

This Court has held that the North Carolina Industrial Commission's findings of fact are conclusive on appeal of an employee's claim if they are supported by competent evidence. *Rierson v. Commercial Serv.*, 116 N.C. App. 420, 448 S.E.2d 285. However, the North Carolina Industrial Commission's judgment is subject to appellate review. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 60(b)(6) allows that the court may relieve a party from a final judgment or order for any other reason justifying relief from the operation of the judgment. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 60(b)(6) is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. The North Carolina Supreme Court has indicated that the appellate court cannot substitute what it considers to be its own better judgment for a discretionary ruling of a trial court, and that the appellate court should not disturb a discretionary ruling unless it probably amounted to a substantial miscarriage of justice. Further, a judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason. Generally, on review, awards entered in cases under the North Carolina Workers' Compensation Act shall be conclusive and binding as to all questions of fact. Appeal to the court shall concern only questions of law. N.C. Gen. Stat. §97-86. When the assignments of error bring up for review the findings of fact of the North Carolina Industrial Commission, the court reviews the evidence to determine as a matter of law whether there is any competent evidence tending to support the findings; if so, the findings of fact are

conclusive. If a finding of fact is a mixed question of fact and law, it is conclusive also if there is sufficient evidence to sustain the facts involved. If a question of law alone, the court reviews. *Hogan v. Cone Mills Corp.*, 94 N.C. App. 640; 381 S.E.2d 151.

The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. N.C. Gen. Stat. § 143-293 (2003). Under N.C. R. Civ. P. 52(a)(1), in all actions tried upon the facts without a jury the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. Our Supreme Court has noted that while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. *RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 355-56, 570 S.E.2d 510, 519 (2002). Rule 52 applies to cases heard by the Industrial Commission under the Tort Claims Act. *Parker v. State Department of Transp.*, 122 N.C. App. 279, 468 S.E.2d 589 (1996).

A trial court's duty pursuant to N.C. Gen. Stat. § 1A-1, Rule 52 to find facts and state its conclusions separately merely serves to provide a basis for appellate review. The appellate review this Court must be able to conduct consists of a

determination of whether the trial court's findings of fact are supported by competent evidence and the trial court's conclusions of law are supported by its findings of fact. *Department of Transp. v. Byerly*, 154 N.C. App. 454, 459, 573 S.E.2d 522, 525 (2002). Thus, in making findings of fact, the trial court is required only to make brief, pertinent and definite findings and conclusions about the matters in issue. *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 753, 315 S.E.2d 537, 538 (1984).

The Workers' Compensation Act (the "Act") is a compromise arrived at through the concessions of employees and employers alike. Nothing in it supports the notion that it was enacted just for the protection of careful, prudent employees, or that employees that do not stick strictly to their business are beyond its protection. By its terms, with certain exceptions the Act applies to all employees who work for employers with the requisite number of employees and are injured by accident during the course of and arising from their employment. *Bare v. Wayne Poultry Co.*, 70 N.C. App. 88, 318 S.E.2d 534 (1984), *cert. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985).

The social policy behind the Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers. Although the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 345 S.E.2d 374 (1986). The threefold conditions antecedent to the right to

compensation under the Act are: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. *Wilson v. Town of Mooresville*, 222 N.C. 283, 22 S.E.2d 907 (1942). An employee must also establish a fourth essential element, that his injury caused him disability, unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E.2d 874 (1968). The primary purpose of workers' compensation is to compensate injured employees for their loss of earning capacity at approximately their present standard of living and maintain said standard of living so long as the injury continues to effect earning capacity, not to compensate for pain and suffering. *Richardson v. North Carolina Department of Correction*, 345 N.C. 128, 478 S.E.2d 501. Also see Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

The fact that plaintiff sustained an injury is a critical fact upon which her right to compensation depends; thus, a specific finding of that fact is required by the Commission. *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985). More must be shown than an injury while at work to sustain a claim for compensation. *Hargus v. Select Foods, Inc.*, 271 N.C. 369, 156 S.E.2d 737 (1967). To be compensable an injury must spring from the employment or have its origin therein. *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964). Also see *McNeely v. Carolina Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934).

The intent of the Act is to base compensation upon the normal income which the employee derived from his employment. *Lovette v. Reliable Mfg. Co.*, 262 N.C. 288, 136 S.E.2d 685 (1964). It seems reasonable that the legislature, having placed the economic loss caused by a worker's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971).

The specific traumatic incident provision of G.S. 97-2(6) requires plaintiff to prove an injury at a judicially cognizable point in time. Judicially cognizable does not mean "ascertainable on an exact date," but instead should be read to describe a showing by plaintiff which enables the Commission to determine when, within a reasonable period, the specific injury occurred; the evidence must show that there was some event that caused the injury, not a gradual deterioration, and if the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied. *Ruffin v. Compass Group USA*, 150 N.C. App. 480, 563 S.E.2d 633 (2002). The question of whether compensation is recoverable under the Act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law. *Harden v. Thomasville Furn. Co*, 199 N.C. 733, 155 S.E. 728 (1930). Where there is no conflicting evidence and the Industrial Commission decides as a matter of law that there is no sufficient competent evidence that

the injury to plaintiff was "by accident arising out of and in the course of employment," the question is one of law and is reviewable by the court upon appeal. *Massey v. Board of Educ.*, 204 N.C. 193, 167 S.E. 695 (1933). The determination of whether an accident arises out of and in the course of employment under this section is a mixed question of law and fact, and the appellate court may review the record to determine if the findings and conclusions are supported by sufficient evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977).

Whereas the Plaintiff filed a Tort Claim against the Defendant (R pp. 2-3), the Defendant moved to dismiss the claim (R pp. 6-9) and subsequently filed a motion for summary judgment (R pp. 10-31), the Defendant became the claimant in a claim under the Act in order to invoke the exclusivity provisions as legal authority to preclude, prohibit and deny the Plaintiff the right to maintain this common law claim for civil remedy sought before the Commission.

The Plaintiff responded to the Defendant's motion by contending that the Defendant failed to provide sufficient and competent evidence to support the affirmative defense that the alleged injury was subject to the jurisdiction of the Act and called the Defendant's evidence into question (R pp. 40-54; T pp. 1-6). The Plaintiff also presented evidence to contend that the record and evidence supports the Plaintiff's position the injury is not compensable nor subject to the Act (R pp. 40-54; T pp. 4-6, 10-13). The Plaintiff further contended that the suspension of the discovery proceedings denied the Plaintiff access to evidence relevant to the proceedings and the

Defendant's affirmative defense (R p. 54; T pp. 5, 9-13).

The Plaintiff presented the documentation and evidence provided through the discovery proceedings before the filing of the Defendant's motion, which the Plaintiff asserts present numerous genuine issues of material fact and triable issues of facts, and presented numerous questions of law and fact (R pp. 32-175; T pp. 4-6, 10-13). Primarily, the Plaintiff presented the question of law as to the if the injury arose by accident out of and in the course of the employment, if the injury resulted in a compensable disability under the Act, if the injury was connected to the employment and not one which the general public was equally exposed, and if the injury was directly and proximately caused by the intentional misconduct which the Defendant knew was substantially certain to cause serious injury to the Plaintiff and others similarly situated (R pp. 43-53, 187-198, 236-248; T pp. 4-6, 10-13). The Commission found in favor of the Defendant and dismissed the Plaintiff's claim after the initial hearing and on appeal to the Full Commission (R pp. 220-223, 262-267).

The Plaintiff asserts that the order issued by the Full Commission is absent of any competent or sufficient findings of fact as to the alleged injury in question, makes no reference to the alleged genuine issues of material fact and triable issues of fact or the documentation and evidence presented in support thereof. In addition, the Plaintiff further contends that the injury did not result in a disability and is not compensable under the Act (R pp. 220-223, 262-267).

Where the Plaintiff has contended on appeal that the Commission has made various errors of law, this Court is authorized to review the evidence and the questions of law and to determine if the questions of law were properly adjudicated and the findings of fact and conclusions of law proper and just. The Plaintiff further asserts that this is a substantial miscarriage of justice as the Commission failed to address or make an appropriate finding of fact and corresponding conclusion of law for every crucial question upon which the right to remedy of the Plaintiff depends.

II. THE COMMISSION FAILED TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF AND FURTHER FAILED TO EXERCISE THE APPROPRIATE STANDARD OF REVIEW AND SCOPE OF REVIEW OF THE EVIDENCE PRESENTED.

ASSIGNMENT OF ERROR NO. 3; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 4; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 5; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 6; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 7; R pp. 220-223, 262-267

Without a substantial evidence review in the findings of fact, any final judgment should be remanded for a new order characterizing the issues before the court and setting forth the standard of

review applied by the court in resolving each of those issues. If an appeal is based on an error of law, then "de novo" review is required. If, however, the appeal questions whether the decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test. "De novo" review requires a court to consider a question anew, as if not considered or decided by the trial court. The "whole record" test requires the reviewing court to examine all competent evidence in order to determine whether the decision is supported by "substantial evidence". In examining the trial court's order for error of law, the process has been described as a twofold task of determining whether the trial court exercised the appropriate scope of review and, if appropriate, deciding whether the court did so properly. *Willis v. City of Southport Board of Adjustment*, 129 N.C. App. 499, 500 S.E.2d 723. The proper standard of review for motions to dismiss require a substantial evidence review. *State v. Scott*, 356 N.C. 591, 573 S.E.2d 866.

In consideration of the foregoing, the Plaintiff shows that the only evidence that the Defendant presented in order to support the Defendant's Motion to Dismiss and Motion for Summary Judgment was an Affidavit of Timothy S. Blair, an agent and employee of the Defendant with knowledge of facts relevant to this matter, and certain documentation from the Plaintiff's employment file confirming that the Plaintiff was employed with the Defendant from 9 August 2002 until 18 September 2003 (R pp. 17-19). The Plaintiff has not disputed this claim and admits and confirms the aforementioned period of employment with the Defendant (R pp. 42-45, 58-60,

185-186, 238-239). However, the Plaintiff has contested and objected to the admission of the Affidavit of Timothy S. Blair on the grounds that his character has been called into question by the record (R pp. 42-45, 62-68, 80-86, 102-103, 117, 128-175; T p. 5, lines 7-13) and that he is not a qualified expert to make representations with respect to the Plaintiff's medical condition or the indoor air quality of the facilities in question maintained by the Defendant (R pp. 42-45, 185-186, 238-239; T p. 5, lines 7-13). In addition, the Plaintiff showed that the Plaintiff made request for production of documents from the Plaintiff's employment file with the Defendant and interrogatories for the testimony from Timothy S. Blair, and no response was received (R pp. 117, 121).

These contentions and objections were disregarded by the Commission in the initial hearing and on appeal, despite the fact that both the Defendant and the Commission confirmed on the record that no expert testimony is currently on record in these proceedings (R pp. 220-223, 262-267; T pp. 9-13). In defense of the Defendant's Motion for Summary Judgment, the Plaintiff presented evidence to show genuine issues of material fact and triable issues of fact as to if the injury in question arose out of and in the course of the employment, to show that the Plaintiff was denied the substantial right to seek discovery in these proceedings, and the Plaintiff was improperly denied the right to maintain this common law claim for civil remedy (R pp. 32-175, 177-213, 227-251).

III. THE COMMISSION FAILED TO ADDRESS THE CRUCIAL QUESTION OF THE PLAINTIFF'S

OUTSTANDING DISCOVERY REQUEST PENDING RESPONSE FROM THE DEFENDANT AND DENIED THE PLAINTIFF A SUBSTANTIAL RIGHT TO SEEK DISCOVERY IN SUPPORT OF HIS CLAIMS AND DEFENSE AGAINST THE DEFENDANT'S MOTION TO DISMISS.

ASSIGNMENT OF ERROR NO. 4; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 13; R pp. 220-223, 262-267

Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so. The general purpose of discovery is to assist in the disclosure prior to trial of any relevant unprivileged materials and information. Such exchanges help the parties narrow and sharpen the basic facts and issues prior to trial. *Burge v. Integon General Ins. Co.*, 104 N.C. App. 628, 630, 410 S.E.2d 396, 398 (1991). Thus, motions for summary judgment generally should not be decided until all parties are prepared to present their contentions on all the issues raised. See *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 441, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

In consideration of the foregoing, the Plaintiff shows that the Plaintiff duly, timely and properly served the Defendant with a request for discovery, a response to which has not yet been provided (R pp. 108-127). Given the alleged genuine issues of

material fact and triable issues of fact existing in this matter, the Plaintiff alleges that a substantial right was denied the Plaintiff in obtaining responses to discovery in order to provide a legal position with respect to the Defendant's Motion for Summary Judgment based upon all unprivileged evidence and documentation in existence at this time requested in the Plaintiff's discovery (R pp. 54, 196-206, 241-242). The Plaintiff acknowledges that the issue of outstanding discovery is interlocutory with the contention of the existence of alleged genuine issues of material fact and triable issues of fact, and, the Plaintiff has no substantial right to seek further discovery without the existence of genuine issues of material fact and triable issues of fact. However, given the proper standard of review, the failure of the Commission to make proper findings of fact, and the lack of expert testimony on the record, the Plaintiff has been denied a substantial right and should be allowed to proceed with discovery in these proceedings. The Plaintiff further contends that the suspension of discovery was not in the interest of justice.

IV. THE FINDINGS OF FACT AND THE CONCLUSIONS OF LAW MADE BY THE COMMISSION ARE NOT IN ACCORDANCE WITH THE STANDARD OF REVIEW AND ARE NOT SUPPORTED BY THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 8; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 9; R pp. 220-223, 262-267

ASSIGNMENT OF ERROR NO. 10; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 11; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 12; R pp. 220-223, 262-267

The Plaintiff objects to the Commission's Finding of Fact #1, which finds that the alleged injury occurred between September and November 2003 during employment with the Defendant and at the time of the injury in Wood Hall (R p. 263). First, the Plaintiff resigned from employment with the Defendant on 18 September 2003 (R pp. 58-60). Second, there exists evidence, and same was duly presented to the Commission, that the injury allegedly arose from the negligence of the Defendant both before and after the terms of employment (R pp. 43-53, 58-60, 80-86, 130-175). The Plaintiff further contended that the circumstances of the injury during the term of employment did not hold that the injury arose out of and in the course of the employment in the facility indicated and other facilities unrelated to the employment owned, operated and maintained by the Defendant (R pp. 40-54, 187-198).

The Plaintiff objects to the Commission's Finding of Fact #5, which finds, based upon Finding of Fact #1 disregarding certain evidence and contentions and limiting the scope of these claims, further found that the Plaintiff would not have been exposed to the alleged conditions caused by negligence if not for employment with the Defendant.

The Plaintiff objects to the Commission's Finding of Fact #6, based upon Findings of Fact #1

and #5, which found that an employment relationship existed at the alleged time of injury.

The Plaintiff objects to the Commission's Finding of Fact #7, based upon Findings of Fact #1, #5 and #6, which found that the Plaintiff was an employee of the Defendant at all relevant times.

The Plaintiff objects to the Commission's Conclusion of Law #2, based upon the Findings of Fact, which found that the Plaintiff was an employee of the Defendant at the time he was allegedly exposed to the allegedly negligent conditions, which is contrary to the evidence (R pp. 32-175).

The Plaintiff objects to the Commission's Conclusion of Law #3, based upon the Findings of Fact, which found that the Plaintiff failed to forecast evidence to show that the Plaintiff was not an employee of the Defendant at the time of alleged exposure, which is not supported by the forecast of evidence (R pp. 32-175).

The Plaintiff objects to the Commission's Conclusion of Law #4, based upon the Findings of Fact, which found that the Plaintiff failed to show that the Commission has subject matter jurisdiction to hear this claim under the Tort Claims Act and that the Plaintiff has further failed to show there is a genuine issue as to a material fact (R p. 265). The Plaintiff shows that the Plaintiff presented evidence to show alleged genuine issues of material fact and triable issues of fact (R pp. 32-175).

The Plaintiff objects to the Commission's Conclusion of Law #7, based upon the Findings of Fact, which found that the Plaintiff's claim should be dismissed with prejudice, that the Commissions make no determination as to the merits of plaintiff's claim and that the Plaintiff's exclusive remedy is to

seek recourse under the Act (R p. 266). The Plaintiff asserts that the Finding of Fact and the standard and scope of review does not support this conclusion (R pp. 236-248).

When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. *Joyner v. Oil Co.*, 266 N.C. 519, 521, 146 S.E.2d 447, 449 (1966). Also see Richardson v. N.C. Dept. of Correction, 345 N.C. 128, 136, 478 S.E.2d 501, 506 (1996). The loss of wages in the position previously held in the military by the Plaintiff is not subject to the Act whereas this injury occurred under a separate employment relationship (R pp. 58-60, 80-86).

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of the act. *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E.2d 109 (1948). Also see *Thompson v. Virginia & C.S.R.R.*, 216 N.C. 554, 6 S.E.2d 38 (1939); *Morris v. Laughlin Chevrolet Co.*, 217 N.C. 428, 8 S.E.2d 484 (1940). The medical expenses are also not subject to the Act whereas medical expenses are in no way a part of compensation under the Act (R pp. 80-87).

The Plaintiff has presented evidence to show that the injury did not occur at a judicially recognizable point in time and did not arise by accident by definition under the Act (R pp. 236-248). The Plaintiff has also presented evidence to show that the injury did not arise out of and in the course of the employment, where the injury was caused by the facilities maintained by the Defendant, tenancy in the facilities was a preliminary and postliminary activity of the employment, a hazard to which the

general public was equally exposed, not related or correlated to the employment or a risks of the employment, and arose from causes unrelated to the employment before, during and after the term of employment (R pp. 236-248)

At no time from and after August 1999 did the Plaintiff see a loss of wages or wage earning capacity due to the alleged injury in the same employment or any other employment. Following the discharge of the Plaintiff from military service on 9 June 2005, the Plaintiff was provided $12,675 in disability severance pay and obtained a new employment position on 26 June 2005. The Plaintiff, at all times from 26 June 2005 until the present, has earned and continues to earn more than the base pay provided at the time of discharge from the military (R pp. 76-79).

The Plaintiff has presented evidence that other student, staff and faculty similarly situated were also subject to the same conditions, hazards, risks and threats to health and safety, and that student, staff and faculty experienced and suffered from the same afflictions and adverse health conditions as the Plaintiff. The Plaintiff has also shown that the alleged injury was, by statutory definition, a disease, which does not meet the requirements for compensability under the Act (R pp. 236-248).

The Plaintiff has asserted that the Defendant is guilty of willful and intentional misconduct which the Defendant knew was substantially certain to cause serious injury or death to the Plaintiff and others similarly situated (R pp. 236-248). The Plaintiff presented evidence that the Defendant knew that the facilities owned, operated and maintained by the Defendant posed a risk and

hazard to the health and safety of student, staff, faculty and visitors and invitees alike in December 1999 (R pp. 130-175). The Defendant further knew, in detail, the building and safety code violations which existed in various facilities owned, operated and maintained by the Defendant (R pp. 130-175). In addition, the Defendant knowingly and intentionally delayed the remediation to correct said violations for a period of five (5) years from 2000 until 2005 (R pp. 130-175). In that time, various between 2000 and 2005, the Defendant was made aware, failed to properly remedy and even intentionally attempted to conceal or deny, the existence of said conditions (R pp. 62-69). The Plaintiff is a member of the class which were subject to said conditions which the Defendant had knowledge from and after December 1999 (R pp. 62-69, 80-86, 128-175). The failure of the Defendant to remedy same and to intentionally, willfully and consciously delay the remediation of same is intentional misconduct, but the intent to remedy same shows that the Defendant knew that same was substantially certain to cause serious injury or death to those exposed to said hazards, risks and threats to health and safety, including the Plaintiff. The Plaintiff was injured as a result said conditions and the intentional misconduct of the Defendant was the direct and proximate cause of the Plaintiff's injury (R pp. 58-60, 80-86).

V. THE COMMISSION VIOLATED THE FOURTEENTH AMENDMENT OF THE UNITED STATES BY DENYING THE PLAINTIFF THE RIGHT TO MAINTAIN A COMMON LAW CLAIM

FOR CIVIL REMEDY WITHOUT ADEQUATE GROUNDS.

ASSIGNMENT OF ERROR NO. 14; R pp. 220-223, 262-267
ASSIGNMENT OF ERROR NO. 15; R pp. 220-223, 262-267

When an effective administrative remedy exists, that remedy is exclusive. However, when the relief sought differs from the statutory remedy provided, an administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court. *Johnson and Smith v. First Union Corporation*, 128 N.C. App. 450, 496 S.E.2d 1 (1998).

With regard to the Act, the incidence of the law is on the status created by the contract of employment. It deals with the incidents and risks of that employment, in which concededly is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common law or other rights which pertain to the parties only as members of the general public, disconnected with the employment. Expressions in the Act regarding the surrender of the right to maintain common law or statutory actions against the employer are not absolute -- not words of universal import, making no contact with time, place, or circumstance. They must be construed within the framework of the Act, and as qualified by its subject and purposes. The North Carolina Workmen's Compensation Act relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the

course of the employment relation. Where that relation does not exist the Act has no application. Where the employer and the employee are subject to and have accepted and complied with the provisions of the Act, the rights and remedies therein granted to the employee exclude all other rights and remedies in his favor against the employer. N.C. Gen. Stat. § 97-10.1. The Act does not, however, take away any common law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public. *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1984).

The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. This principle requires that all persons similarly situated be treated alike. North Carolina courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis. *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996).

Whereas the Defendant failed to meet the burden of proof required by the standard of review for claims under the Act or the provisions of the Act, and the Plaintiff has presented evidence to show that the Act has no application, the Plaintiff is not subject to or in compliance with the terms of the Act and is not a member of the class subject to the Act (R pp. 32-175)

Whereas it has been determined that the Plaintiff is subject to and in compliance with the Act

and that the Plaintiff is a member of the class subject to the Act, without the proper evidence and findings and conclusions therefrom, the Plaintiff contends that this is a violation of the principles of equal protection under the law. The Plaintiff contends that this adverse action will leave the Plaintiff with no remedy in equity or law for this injury (R pp. 236-248).

The Plaintiff further asserts that the unjustified failure of the Defendant to provide discovery in these proceedings as well as the Defendant's Motion for Summary Judgment to facilitate the delay and suspension of the discovery in these proceedings is a gross miscarriage of justice and entitles the Plaintiff to extraordinary remedy for which the Plaintiff prayed to the Commission (R pp. 236-248).

CONCLUSION

In conclusion, the Plaintiff prays the Honorable Court of Appeals reviews the record and makes the appropriate findings and order of remand in these proceedings in accordance with the standard of review, the scope of review for the evidence presented and controlling law.

This the 27th day of December 2007.

PLAINTIFF
/s/ JOSEPH KAMAU CHRISTOPHER BEY
[Pro Se]

NORTH CAROLINA COURT OF APPEALS

APPEAL INFORMATION STATEMENT

COA DOCKET NO. 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY
v.

NORTH CAROLINA STATE UNIVERSITY [ET AL.]

FROM THE
NORTH CAROLINA INDUSTRIAL COMMISSION
TRIAL DOCKET NO. TA-19383

TRIAL JUDGE: FULL COMMISSION PANEL BY COMMISSIONER CHRISTOPHER SCOTT, CHAIRMAN, CHAIR BUCK LATTIMORE, COMMISSIONER DIANNE SELLERS

****

Party filing appeal: J. KAMAU CHRISTOPHER a/k/a JOSEPH KAMAU CHRISTOPHER BEY, Plaintiff

1. Date Judgment Entered: 10 August 2007.

2. Date of Notice of Appeal: 10 September 2007.

3. (a). Is this a final judgment as to all claims and all parties? Yes; (b). If no, state the basis on which the judgment/order is immediately appealable: N/A

4. (a). Check the appropriate line(s) best describing the nature of the case: Attorney's fees, Contempt, Employment and Labor, Environmental Law, Landlord/Tenant, Negligence, Sanctions, Tort Claims Act, Workers' Compensation

(b). Check the appropriate line(s) to show the ruling being appealed: Administrative Ruling, Dismissal, Summary Judgment

5. State issues to be raised on appeal:

The Plaintiff Appellant will raise the following issues on appeal:

a. The standard of review for invoking the authority of the exclusivity provisions of the Workers' Compensation Act to preclude a common law claim for civil remedy.

b. The standard of review and scope of review for evidence presented in summary judgment proceedings and in invoking the authority of the exclusivity provisions of the Workers' Compensation Act to preclude a common law claim for civil remedy.

c. The right of any party to an action to seek discovery in order to refine the allegations, assertions, contentions and defenses, and to collect evidence and support for genuine issues of material fact and triable issues of fact in summary judgment proceedings and in invoking the authority of the exclusivity provisions of the Workers' Compensation Act to preclude a common law claim for civil remedy.

d. The standard of review, threshold questions, crucial questions and scope of review for evidence in making findings of fact and conclusions of law in summary judgment proceedings and in invoking the authority of the exclusivity provisions of the Workers' Compensation Act to preclude a common law claim for civil remedy.

e. The interlocutory issues of the alleged errors of law, disregard of evidence, and the denial of the Plaintiff to continue to seek discovery in this matter and the alleged genuine issues of material fact and triable issues of fact

f. The equal protection against preclusion and prohibition under the law afforded to claimants in maintaining a common law claim for civil remedy in summary judgment proceedings and in invoking the authority of the exclusivity provisions of the Workers' Compensation Act to preclude a common law claim for civil remedy.

g. The appropriate remedy for aggrieved parties entitled to attorneys fees and other extraordinary remedies for responding to an inappropriate and unjustified motion for summary judgment and unjustified failure to receive satisfactory responses to discovery.

6. (a). Has any prior appeal in this case been filed in either appellate courts? Yes

If yes, please provide appellate court docket number: Petition for Writ of Mandamus, Prohibition and Supersedeas, COA No. P07-907.

(b). Are any other appeals in this case pending before either state appellate court? No.

(c). To your knowledge, are there any other appeals raising substantially related issues pending before either appellate court? No.

If yes, provide case name(s) and docket number(s), if known, and explain the manner in which the appeals are related: [N/A]

7. (a). Are there essential questions raised by this appeal that cannot be adequately
presented by the written briefs alone and therefore require oral argument? No.

(b). Do you request oral argument on this appeal? No.

8. Has this appeal, or the matters with which the appeal is concerned, been settled or rendered moot? No. If yes, please explain: [N/A]

9. Is there any reason why this appeal should be expedited? Yes.
If yes, please explain: This appeal should be expedited because the North Carolina Industrial Commission has not enforced the suspension and stay of discovery in these proceedings pending appeal from and after the filing of the Defendant's Motion for Summary Judgment and Motion to Suspend Discovery on 20 July 2006. The Defendant has renovated portions of the premises and facilities in

question. The Plaintiff asserts that the present conditions existing in said facilities are discoverable in these proceedings in the state on the date of service of the Plaintiff's discovery request served 1 May 2006. The Plaintiff responded to the Defendant's Motion for Summary Judgment with a Cross-Motion to Compel and presenting legal argument and evidence that the Defendant scheduled renovations for said premises and facilities on 11 August 2006. The North Carolina Industrial Commission did not rule on the Motion to Compel, but instead dismissed the Plaintiff's action on 9 February 2007 and affirmed the decision on 10 August 2007. The matter of the Plaintiff's right to seek discovery was interlocutory with the crucial question of fact and law pertaining to the existence of genuine issues of material fact and triable issues of fact in these proceedings before the North Carolina Industrial Commission until 10 September 2007, when the Plaintiff filed a notice of appeal to the North Carolina Court of Appeals. On 30 October 2007, the Plaintiff filed a Petition for Writ of Mandamus, Prohibition and Supersedeas with the North Carolina Court of Appeals (COA File No. P07-907), seeking, among other things, relief and intervention to restore the rights of the Plaintiff to seek discovery in this matter. The North Carolina Court of Appeals denied the petition by order entered 14 November 2007. The Plaintiff asserts a fundamental and substantial right has been denied to collect unprivileged evidence through discovery to refine and specify these claims. The Plaintiff requests that this appeal be expedited as a matter of law to adjudicate the claim of the Plaintiff pertaining to the right to seek discovery. Expedition is

appropriate as same is interlocutory with the crucial question of fact and law pertaining to the existence of genuine issues of material fact and triable issues of fact in these proceedings.

10. Has the execution or enforcement of the order, judgment or other determination from which the appeal has been taken been stayed pending disposition of the appeal? No.

The undersigned attorney for the appellant(s), or the pro se appellant, hereby certifies that the information provided herein is true to the best of his/her own knowledge.

Signed this the 27th day of December 2007.

[PLAINTIFF-APPELLANT]
/s/ JOSEPH KAMAU CHRISTOPHER BEY
[Pro Se]

APPENDIX H

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE

DEFENDANT-APPELLEE'S REPLY BRIEF

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED FEBRUARY 27, 2008

Statement of the Case

This tort claim was filed with the North Carolina Industrial Commission on December 30, 2005. Defendant timely answered and filed a motion to dismiss, and a motion for summary judgment, on the grounds that Plaintiff's exclusive remedy was to file a claim under the North Carolina Workers' Compensation Act, not the Tort Claim[s] Act (R p[p]. 6-9, 10-31). Plaintiff filed a response to the summary judgment motion. (R p[p]. 32-177).

On February 9, 2007, Deputy Commissioner Taylor granted Defendant's motion for summary judgment, dismissing with prejudice Plaintiff's tort claim. (R p. 220) Plaintiff timely appealed to the Full Commission of the Industrial Commission. (R p. 224)

On [review of] the Full Commission affirmed the Deputy's ruling. (R p. 262) Plaintiff appealed to the North Carolina Court of Appeals (R p. 268) The printed record was filed on December 14, 2007. Plaintiff filed his brief with the Court of Appeals on December 28, 2007. Defendant was granted additional time to file its brief, up to and including February 27, 2008.

Statement of the Facts

Plaintiff filed this tort claim with the Industrial Commission on December 30, 2005, alleging, in pertinent part, that while he was enrolled at Defendant's university as a student and working as a Resident Advisor during September through November 2003, he was exposed to mold from an air conditioning system, and subsequently

contracted a mold related respiratory illness. Plaintiff alleged that he was a student at Defendant's university and he "subsequently became an employee and resident of University Housing facility as a Resident Advisors at Wood Hall." (R p. 2)

Defendant timely answered and moved to dismiss Plaintiff's tort claim for failure to state a claim for relief and lack of personal and subject matter jurisdiction, on the basis that Plaintiff's exclusive remedy was under the North Carolina Workers' Compensation Act, not the Tort Claims Act. (R p. 6) Defendant subsequently filed a motion for summary judgment on July 20, 2006. Plaintiff filed responses to Defendant's motion on August 11, 2006 and December 14, 2006.

On November 9, 2006, Deputy Commissioner Wanda Blanche Taylor, heard the parties' arguments regarding Defendant's motion for summary judgment. On February 9, 2007, Deputy Commissioner Taylor granted Defendant's motion for summary judgment, dismissing with prejudice Plaintiff's tort claim, holding that Plaintiff's exclusive remedy is under the North Carolina Workers' Compensation Act. (R p. 220)

No evidentiary hearing was held in this matter.

ARGUMENT

I. PLAINTIFF'S TORT CLAIM WAS PROPERLY DISMISSED BECAUSE PLAINTIF'S EXCLUSIVE REMEDY FALLS UNDER THE NORTH CAROLINA WORKERS' COMPENSATION ACT, NOT THE TORT CLAIMS ACT.

Assignments of Error 1-10 (R p. 293-297)

Plaintiff's allegations in his tort claim affidavit, and his responses to Defendant's summary judgment motion, all indicate that Plaintiff was an employee of Defendant's when he allegedly was exposed to mold in his dormitory where he was working as a resident advisor.

Indeed, Plaintiff even admitted during the summary judgment proceeding that he was an employee of Defendant at the time of the alleged exposure to mold. (T p. 4, Lines 12-15; T p. 5, 18-19) The Industrial Commission was correct in concluding that there was no genuine dispute as to a material fact regarding Plaintiff's employee status with Defendant.

Once the material fact that Plaintiff indeed was an employee of Defendant when Plaintiff was allegedly exposed to mold and injured, the Industrial Commission lost "Tort Claim" jurisdiction over this matter, and Plaintiff's sole remedy was under the Workers' Compensation Act. Plaintiff's tort claim was properly dismissed with prejudice and judgment entered in favor of Defendant.

A. The Commission Applied the Correct Standard of Review

Plaintiff argues through out his assignments of error that the Industrial Commission applied the incorrect standard. But this argument is without merit, where the Commission properly applied the summary judgment standard. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, who that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). In making this determination, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574,577 (1998).

Evidence which may be considered under this rule includes admissions in the pleadings, depositions on file, answers to interrogatories, admissions on file with the court, sworn affidavits, and any other material which would be admissible at trial. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Once a defendant forecasts competent evidence which will be available at trial, and tends to show his right to judgment as a matter of law, Plaintiff must present a forecast of evidence which will be available for presentation at trial that will support his claim for relief. If Plaintiff fails to respond to the Defendant's motion with a forecast of such evidence, summary judgment should be entered for the defendant. *Best v. Perry*, 41 N.C. App. 107, 254 S.E.2d 281 (1979).

The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact, which may be satisfied by showing that the party cannot overcome an affirmative defense which would bar the claim. *Taylor v. Ashburn*, 112 N.C. App. 604, 606-07, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994).

The moving party meets this burden if it can show that an essential element of the nonmoving

party's claim does not exist, or that the nonmoving party cannot produce evidence of an essential element of his claim, or cannot overcome an affirmative defense which would bar the claim. Once the party moving for summary judgment meets its burden, it is the nonmoving party's burden to produce a forecast of evidence showing that it will be able to establish at least a prima facie case at trial. *Forsyth Mem. Hosp. v. Armstrong World Indus., Inc.*, 112 N.C. App. 413, 470 S.E.2d 826 (1996).

"If the movant's buren is carried, the burden is on the opposing party to show that there is a question of material fact that can only be resolved by proceeding to trial." *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 332 S.E.2d 186, *cert. denied*, 314 N.C. 662, 335 S.E.2d 902 (1985).

B. The Tort Claims Act Does Not Apply In This Case

Under the Tort Claims Act, the State has expressly waived its sovereign immunity in certain circumstances. N.C. Gen. Stat. §§ 143-291, 143-297 (2007). This waiver of immunity shall be strictly constued. *Floyd v. N.C. State Highway Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955). The Industrial Commission has jurisdiction under N.C. Gen. Stat. § 143-291, et seq., to hear tort claims arising as a result of the alleged negligence of an officer, employee, involuntary servant, or agent of the State while acting within the scope of his employment or agency, or authority under circumstances where the State, if a private person, would be liable to the Plaintiff under state laws. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

C. The Workers' Compensation Act Applies In This Case

In claims by employees involving injuries by accident arising out of and in the course of employment, and occupational illnesses allegedly contracted through employment, a plaintiff's exclusive remedy is to file a claim under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-10.1 (2007); See also *Ryles v. Durham Co. Hosp. Corp.*, 107 N.C. App. 455, 420 S.E.2d 487, *cert. denied*, 333 N.C. 169, 424 S.E.2d 406 (1992) (holding that college respiratory therapist student was limited to Workers' Compensation remedy in slip and fall at college).

The question of whether an employer-employee relationship exist is jurisdictional. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). "An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the act." *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976). "When an inmate is injured while working at his prison job, his exclusive remedy for any injury is the workers' compensation claim . . . " *Vereen v. N.C. Dep't of Corr.*, 168 N.C. App 588, 608 S.E.2d 412 (2005).

D. Workers' Compensation Act Is Plaintiff's Exclusive Remedy

Plaintiff's exclusive remedy in this case is under the North Carolina Workers' Compensation

Act. Plaintiff openly admitted in his pleadings and before the Industrial Commission that he was an employee of Defendant's during the time period he was allegedly exposed to mold, i.e., September through November 2003. To wit:

1. In his tort claim Affidavit, Plaintiff alleged that he "became an employee and resident of University Housing facility as a Resident Advisor at Wood Hall." (R p. 2) emphasis added)

2. During oral arguments at the summary judgment hearing on November 9, 2006, when asked by the Deputy Commission if he were a student while at N.C. State University, Plaintiff stated, "[yes], I was. I was- I was a student, as well as an employee." (T p. 18-19) (emphasis added)

3. On pages 16-17 of Plaintiff's August 11, 2006, brief, he admitted in several placed that he was a temporary Resident Assistant employee of Defendant at the time of exposure. Plaintiff appears to make the argument that he was not required to file a "claim" until after he left employment with Defendant and was later diagnosed with a health condition. (R p. 47-48) But Plaintiff misses the point, that because he was working in the course and scope of employment with Defendant while he allegedly contracted his health condition, his right to file a tort claim were estinguished; however, he continued to have the right to file a workers' compensation claim. N.C. Gen. Stat. § 97-10.1 (2007).

4. On Page 21, third paragraph, of Plaintiff's August 11, 2006, brief, he admits that, "While the Plaintiff does claim he is physically disabled . . . by an injury which manifested itself during the period of employment for the Defendant." (R p. 52)

5. On Page 3 of Plaintiff's Response to Defendant's Motion for Summary Judgment, Plaintiff states, ". . . while enrolled as a student at Defendant's university resident as a tenant and resident in facilities maintained by the Defendant, and employed as a temporary employee in the capacity of a Resident Advisor." (R p. 179)

6. On Page 9 of Plaintiff's Response to Defendant's Motion for Summary Judgment Plaintiff does not dispute that he had an Employment File with Defendant, and that certain documents presented by Defendant to the court came from his file. (R p. 185) Also, on Page 15, second pararaph, Plaintiff admits that, he "voluntarily terminated and resigned from the position of Resident Advisor on September 18, 2003, which resignation occurred before the Plaintiff received verifable medical evidence . . . " regarding his alleged medical condition. (R p. 191)

7. In the last paragraph of Plaintiff's December 14, 2006, brief, he again admits to being employed with Defendant during the relevant time period: While Plaintiff admits and acknowledges that his relationship with the Defendant included a (sic) employer-employee arrangement, as defined by the Statutes, and thus he was employed with the Defendant during a period in which the alleged injury manifest itself, Plaintiff denies that his exclusive remedy is under the Workers' Compensation Act. (R p. 191)

Plaintiff was offered and accepted employment with Defendant as a Resident Advisor for the terms of August 9, 2002, through May 17, 2003; and again from August 5, 2003, through May 16, 2004.

Attached to Plaintiff's reply briefs to Defendant's summary judgment motion, Plaintiff submitted inadmissible material, which included newspaper articles on mold, that may not be considered in a summary judgment proceeding.

In contrast, Defendant submitted with its summary judgment motion admissible material supporting the fact that Plaintiff was an employee working in the course and scope of employment with Defendant while he was alleged exposed to harmful mold in the dormitory on Defendant's campus. Defendant submitted the sworn affidavit of Timothy S. Blair, Associate Director of University Housing, confirming this fact. (R p. 17)

According to Mr. Blair, an integral part of Plaintiff's compensation package was to reside in Wood Hall, where Plaintiff alleged that he was exposed to air-borne contaminants. Plaintiff would not have been in close proximity to the alleged mold or air-borne contaminants were it not for his employment with Defendant and him residing in Wood Hall as a Resident Advisor. (R p. 17-19)

In addition, Plaintiff was offered a Resident Advisor appointment in Wood Hall with Defendant on February 7, 2002, for the 2002-2003 academic year; he was paid an annual rate by Defendant to reside in Wood Hall; he signed a Resident Advisor Contract; and completed an "Employee's Withholding Allowance Certificate," and he responded to the needs of fellow students in Wood Hall, was on-call for emergencies in Wood Hall 24 hours a day, and carried out the general responsibilities of a Resident Advisor during the period complained of. (R p. 20-31)

In addition, Plaintiff even completed W-4 Employee Withholding Allowance forms, along with

Employment Eligibility Verification forms for Defendant. (R p. 28-31)

Both Defendant and Plaintiff benefited from the Resident Advisor employment relationship where Defendant received the services of Plaintiff around the clock, and Plaintiff received a set salary of $1,200.00 a year for the first year as a Resident Advisor, and a rent-free, single occupancy room, telephone and internet service, among other perks. (R p. 17)

In response to Defendant's motion for summary judgment, Plaintiff presented no evidence that is competent in a summary judgment proceeding to rebut Defendant's forecast of evidence that will show that Plaintiff was in fact an employee with Defendant during the relevant time periods. In response to Defendant's motion, Plaintiff filed his brief, which in turn makes reference to documents he produced to Defendant during discovery, for example: an administrative memorandum; and article about mold; a letter of resignation; an independent case study; a Department of Defendant DD 214 discharge document, etc. (R p. 32-105).

Once a defendant forecasts competent evidence which will be available at trial, and tends to show his right to judgment as a matter of law, Plaintiff must present a forecast of evidence which will be available for presentation at trial that will support his claim for relief. If Plaintiff fails to respond to the Defendant's motion with a forecast of such evidence, summary judgment should be entered for the defendant. *Best v. Perry*, 41 N.C. App. 107, 254 S.E.2d 281 (1979). Plaintiff has failed to present any competent evidence that would be available to him at trial that rebuts Defendant's contention that

he was allegedly injured while working in the course and scope of employment with Defendant. Plaintiff has failed to present any sworn affidavits, admissions, or other competent evidence in response to Defendant's motion, which is required if Plaintiff seeks to counter Defendant's forecast of evidence. There is no genuine issue on the material fact that Plaintiff was an employee with Defendant. This is undisputed. Defendant was entitled to judgment as a matter of law in its favor.

The Industrial Commission does not have jurisdiction to hear Plaintiff's tort claim because Plaintiff's exclusive remedy is to file a claim under the North Carolina Workers' Compensation Act.

CONCLUSION

For the reasons stated above, Defendant respectfully requests that this Court affirm the decision and order of the Industrial Commission.

This is the 27th day of February 2008.

ROY COOPER
ATTORNEY GENERAL
/s/ DAHR JOSEPH TANOURY
DAHR JOSEPH TANOURY

APPENDIX I

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE

PLAINTIFF-APPELLANT'S REPLY BRIEF

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED MARCH 7, 2008

LEGAL ARGUMENT

I. ALL EVIDENCE SUBMITTED BY THE PLAINTIFF WAS PROPERLY SUBMITTED AND IS ADMISSIBLE

North Carolina Rules of Civil Procedure Rule 26 embodies the general provisions relating to all of the discovery rules. Rule 26(e) provides, in pertinent part: (e) Supplementation of Responses. – A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows: (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. N.C. Gen. Stat. 1A-1, N.C. R. Civ. P. 26(e)(2). The purpose behind N.C. R. Civ. P. 26(e) is to prevent a party with discoverable information from making untimely, evasive, or incomplete responses to requests for discovery. The trial court not only has the inherent authority to regulate trial proceedings, but it has the express authority under N.C. R. Civ. P. 37, to impose sanctions on a party who balks at discovery requests. A party's failure to comply with the limited duty imposed by N.C. R. Civ. P. 26(e) is a ground for the trial court to impose such sanctions as exclusion of evidence, continuance, or other appropriate measures on the defaulting party. The sanction provision permits the court to make such

orders as are "just" upon a party's failure to obey an order to provide or permit discovery, including refusing to permit the disobedient party to introduce the matters in question into evidence. *Bumgarner v. Reneau*, 332 N.C. 624; 422 S.E.2d 686.

In the Defendant's Reply Brief, the Defendant presented two new and additional questions in this matter. First, the Defendant argues that the Plaintiff submitted evidence with the Plaintiff's Reply Brief to the Defendant's Motion for Summary Judgment which was improperly submitted and is inadmissible in these proceedings (See Page 10 of the Defendant-Appellee's Brief). Second, the Defendant further argues that the Plaintiff's Response to the Defendant's First Set of Interrogatories and Requests for Production of Documents is irrelevant in these proceedings (See Page 11 of the Defendant-Appellee's Brief).

With respect to the Defendant's first contention, the Plaintiff did not submit any evidence, discovery or sworn affidavits together with the Plaintiff's Reply Brief to the Defendant's Motion for Summary Judgment (R pp. 177-213, 227-250). The Plaintiff did, however, submit six (6) sets of exhibits of documentation with the Plaintiff's Response to the Defendant's First Set of Interrogatories and Request for Production of Documents (R pp. 32-175). These sets of exhibits were (i) a sworn affidavit from the Plaintiff with testimony made based upon the Plaintiff's personal knowledge and belief, (ii) the Plaintiff's Response to the Defendant's First Set of Interrogatories and Request for Production of Documents, together with documents presented therewith, (iii) a newspaper article entitled Students, administrators discuss indoor air quality, published

in the Technician, a student publication of North Carolina State University, authored by Rachael Rogers, dated January 21, 2004 (the "Technician Article"), (iv) North Carolina State University Facility Profile and Ten-Year Capital Plan, dated December, 1999 (the "Facility Profile"), (v) copies of the discovery exchange between the Plaintiff and Defendant March 9, 2006 and May 1, 2006, and (vi) exchange of correspondence between counsel for the Plaintiff and Defendant exchanged between May 1, 2006 and July 24, 2006 (R pp. 56-57). The Plaintiff also made reference to various records maintained by the Defendant of which the Plaintiff nad knowledge of existence, but which had not been provided through discovery proceedings (R pp. 56-57).

The Plaintiff asserts that all of the documentation submitted with the Plaintiff's Response to the Defendant's First Set of Interrogatories and Request for Production of Documents were properly submitted and are admissible evidence in these proceedings.

Pursuant to the North Carolina Rules of Civil Procedure, the sworn affidavit from Plaintiff with testimony made from personal knowledge and belief and the discovery response submitted therewith were properly submitted and admissible evidence in these proceedings (R pp. 58-60). The Plaintiff submitted the Defendant's First Set of Interrogatories and Request for Production of Documents to Plaintiff in order to certify that a complete response was provided to the Defendant (R pp. 75-107). The Plaintiff submitted the Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant in order to certify that the Plaintiff did serve a discovery request upon the

Defendant (R pp. 108-127). The Plaintiff submitted evidence of the exchange of correspondence between counsel for the Plaintiff and the Defendant to show that the Plaintiff granted the Defendant an additional thirty (30) days to respond to the Plaintiff's discovery request and that, as of the date of filing of the Defendant's Motion for Summary Judgment, the Plaintiff had not received a response to same (R pp. 56-57).

With respect to the Technician Article and the Facility Profile, the Plaintiff shows that the Plaintiff, Defendant, and other representatives of the Government of the State of North Carolina and the Governor of North Carolina (hereinafter collectively referred to as the "State") mutually agreed to meet in order to discuss various issues related to his matter in 2003 and 2004 (R pp. 84, 128-175). Before the initiation of these legal proceedings and before the parties hereto obtained legal counsel to solely represent all interests in this matter, in said meetings, the Plaintiff and the Defendant exchanged a number of documents and information, including, but not limited to, the Technician Article and the Facility Profile (R pp. 84, 128-175). Said meetings are evidenced by the Technician Article as well as a certain letter certifying the receipt of documentation by the Office of the Governor of North Carolina (R pp. 69, 84, 128-175).

The Plaintiff has not relied solely on the submission of the Technician Article or the Facility Profile to substantiate any of the claims asserted in this matter. The Plaintiff has submitted same to substantiate the sworn affidavit, notarized verification and narrative provided in response to the Defendant's discovery request Interrogatory Number

4, which requested that the Plaintiff "[s]tate the approximate dates when you first allegedly became exposed to the mold problem at Defendant's campus, along with the names of the locations, buildings, and rooms where alleged mold existed" (R pp. 58-60, 80-86, 107). In addition, in response to Request for Production of Document Number 3 requesting the Plaintiff "[p]rovide copies of all documents, memoranda, notes, reports, investigate documents, statements, and testimony, or other forms of documents from any person, including witnesses and parties to this action, that support your claim for negligence," the Plaintiff responded by stating that "[n]otwithstanding the aforementioned exhibits detailed in Request for Production Item No. 2, Plaintiff has not provided copies of the References cited in this Request for Production of Documents Item No. 3 because said References are either public record or information disseminated by the [Defendant]. The following documents, files or reports have been identified as public records or information maintained or disseminated by the [Defendant]" (R p. 103).

With respect to the legal authority of the North Carolina Rules of Civil Procedure over these discovery proceedings, the Plaintiff asserts that the response was not incorrect when made, nor was the response, though correct when made, no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. The verified exchange of documentation between the Plaintiff and Defendant prior to the commencement of these proceedings shows that the Plaintiff is not knowingly concealing any information pertinent to this matter. At no time

did the Defendant present an objection to this response to said request for production of documents. Moreover, the Defendant consented to the inclusion of said documentation in the Record on Appeal, which consent is confirmed by the Stipulation and Settlement Agreement settling the Record on Appeal (R p. 292).

Given that the discovery proceedings in this matter were suspended, the Plaintiff was not afforded the opportunity to obtain additional evidence in support of these claims, and, in lieu thereof, has presented the aforementioned evidence in good faith to substantiate and support the discovery responses and sworn testimony presented therewith (R pp. 32-61, 128-175). Further, the North Carolina Industrial Commission did not rule on the Plaintiff's Cross-Motion to Compel the Defendant to provide discovery responses, nor did the North Carolina Industrial Commission intervene, enter an injunction, or deny the application for summary judgment on the grounds that the Plaintiff currently has a pending discovery request served upon the Defendant and that the Plaintiff could not provide sworn testimony as to certain matters relevant to these proceedings from personal knowledge and belief (R pp. 32-61, 108-127). In lieu thereof, the Plaintiff provided various evidence from documentation previously exchanged between the Plaintiff and Defendant (R pp. 32-175).

Therefore, the Plaintiff prays the Court accept all evidence submitted by the Plaintiff as properly submitted and admissible in these proceedings.

II. ALL EVIDENCE SUBMITTED BY THE PLAINTIFF WAS SUBMITTED IN GOOD FAITH

AND IS APPROPRIATE IN THESE SUMMARY JUDGMENT PROCEEDINGS

Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 303 S.E.2d 365 (1983). It is not the purpose of the summary judgment procedure to resolve disputed material issues of fact. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970). The office of summary judgment is not to test the sufficiency of the evidence. *Mitchell v. Mitchell*, 12 N.C. App. 54, 182 S.E.2d 627 (1971). Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979). Summary Judgment may not be used to resolve factual disputes which are material to the disposition of the action. *Robertson v. Hartman*, 90 N.C. App. 250, 368 S.E.2d 199 (1988). An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). Motion

for summary judgment must be denied if the opposing party submits material which casts doubts upon the existence of a material fact or upon the credibility of a material witness, or if such doubts are raised by movant's own evidentiary material. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976). As a general proposition issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). In ruling on a motion for summary judgment, the court does not resolve issues of fact, and must deny the motion if there is any genuine issue of material fact. *Warren v. Rosso & Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985).

The nature of summary judgment procedure, coupled with the generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. Indeed, in proper cases, it is desirable to treat the pleading as though it were amended to conform to the evidence presented at the hearing. *Cooke v. Cooke*, 34 N.C. App. 124; 237 S.E.2d 323. The Court is authorized to use the citation, reference and existence of newspaper articles as a record of events for the purposes of establishing the facts. See *Capps v. The City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527.

Notwithstanding the legal argument presented by the Defendant in the Defendant's Reply Brief, the Plaintiff shows that all of the documentation submitted as evidence in support of the Plaintiff's Response to the Defendant's Motion for

Summary Judgment was properly submitted and admissible in these proceedings, and submitted for the purpose of supporting the Plaintiff's legal argument concerning (i) the Woodson exception claim in this matter, (ii) the nature of the injury for appropriate findings of fact as to the injury in question, (iii) the scope of the employment with relation to the injury and the relationship between the employment and the injury and the time frame relevant to the injury, (iv) the character and admissibility of the sworn testimony from Timothy S. Blair and the lack of expert testimony in this matter, and (v) the failure by Defendant to adequately state an affirmative defense against this claim in illustrating that this claim is compensable under the Worker's Compensation Act due to the fact that there was no loss of wages resulting in a disability under the Worker's Compensation Act. Specifically with respect to the Technician Article in question, the Court is authorized to accept evidence presented simultaneously with the filing of a motion for summary judgment or a response thereto, and to consider same as part and parcel of the pleadings of record. The Court is further authorized to utilize newspaper articles to substantiate sworn testimony to establish a record of the facts in the instant case (R pp. 128-175).

In addition, the Technician Article and the Facility Profile substantiates that the requests presented in the Plaintiff's First Set of Interrogatories and Request for Production of Documents were served upon the Defendant in good faith and were not served for dilatory or improper purposes, or for unduly or burdensome purposes (R pp. 108-175).

Whereas the Defendant presupposes, and the North Carolina Industrial Commission agreed, that (i) the Plaintiff was an employee of the Defendant "at all relevant times" or "during the relevant time period", and that (ii) the Plaintiff's injury occurred while the Plaintiff was working "in the course and scope of" employment and the injury "arose by accident out of and in the course of the employment" or was an "occupational disease" allegedly contracted through employment without finding of facts explicitly substantiating same, the Plaintiff contends that the mixed question or law and fact heretofore presented requires a substantial review of the record by the Court (R pp. 262-267). The Plaintiff contends that this substantial review of the record includes, but is not limited to, all materials properly submitted and admissible in summary judgment proceedings, and that all of the evidence presented in the instant case by the Plaintiff was properly submitted and admissible in these summary judgment proceedings.

Conclusion

Given that the case at bar before the Court presents a mixed question of law and fact, the Plaintiff prays the Court review the record and make the appropriate findings and conclusions, and remand this matter to the trial court for review and new findings.

This the 6th day of March 2008,

PLAINTIFF-APPELLANT
/s/ JOSEPH KAMAU CHRISTOPHER BEY

APPENDIX J

COURT OF APPEALS OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. COA 07-1516

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE

ORDER

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED MARCH 10, 2008

The following order was entered:

The motion filed in this cause on the 7th day of March 2008 and designated "Motion to Allow Plaintiff Appellant to Submit a Reply Brief" is allowed. The reply brief for plaintiff-appellant filed contemporaneously with this motion shall be deemed filed.

By order of the Court this the 10th day of March 2008.

Witness my hand and official seal this the 10th day of March 2008.

/s/ JOHN H. CONNELL
CLERK OF [COURT] . . .
NORTH CAROLINA COURT OF APPEALS

APPENDIX K

SUPREME COURT OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. 246-P08

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT-PETITIONER

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE-RESPONDENT

NOTICE OF APPEAL OF RIGHT FROM THE NORTH CAROLINA COURT OF APPEALS TO THE NORTH CAROLINA SUPREME COURT UNDER G.S. 7A-30 AND PETITION FOR DISCRETIONARY REVIEW ON CERTIFICATION BY THE NORTH CAROLINA SUPREME COURT UNDER G.S. 7A-31

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED MAY 29, 2008

NOTICE OF APPEAL OF RIGHT FROM THE NORTH CAROLINA COURT OF APPEALS TO THE NORTH CAROLINA SUPREME COURT UNDER G.S. 7A-30

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Plaintiff, JOSEPH KAMAU CHRISTOPHER BEY (hereinafter the "Plaintiff"), pursuant to Rule 14 of the North Carolina Rules of Appellate Procedure, hereby respectfully notifies the Supreme Court of North Carolina, the Court of Appeals of North Carolina, the North Carolina Industrial Commission and the Defendant of the intent to invoke the right to appeal the order entered 20 May 2008 (North Carolina Court of Appeals File No.: COA07-1516), a copy of which order is attached hereto, affirming the Decision and Order and Order of Dismissal issued by the Full Commission Review Panel, by Christopher Scott, Commissioner and Chair of the Review Panel, Buck Lattimore, Chairman of the Commission, and Dianne C. Sellers, Commissioner, entered 10 August 2007 (North Carolina Industrial Commission File No.: TA-19383). The Plaintiff makes this Notice of Appeal of Right on grounds that the subject matter of this case involves substantial questions and alleged violations of the rights of the Plaintiff under the Constitution of the United States and the Constitution of the State of North Carolina. In further support of this Notice of Appeal of Right, Plaintiff shows unto the North Carolina Supreme Court that this Notice of Appeal was timely filed and same was served upon the North Carolina Court of Appeals, Chair of the North

Carolina Industrial Commission and the Defendant as prescribed by the aforementioned Rule. This Notice of Appeal of Right is further supported by the following incorporated Memorandum of Law.

PETITION FOR DISCRETIONARY REVIEW ON CERTIFICATION BY THE NORTH CAROLINA SUPREME COURT UNDER G.S. 7A-31

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

In addition, the Plaintiff, pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure, hereby respectfully petitions and moves the Supreme Court of North Carolina, with notice to the Court of Appeals of North Carolina, the North Carolina Industrial Commission and the Defendant, to certify for discretionary review the judgment of the North Carolina Court of Appeals entered 20 May 2008 (North Carolina Court of Appeals File No.: COA07-1516), a copy of which order is attached hereto, affirming the Decision and Order and Order of Dismissal issued by the Full Commission, by Christopher Scott, Commissioner, Buck Lattimore, Chairman of the Commission and Dianne C. Sellers, Commissioner, entered 10 August 2007 (North Carolina Industrial Commission File No.: TA-19383) for all other subject matter not pertaining to the substantial questions and alleged violations of the rights of the Plaintiff under the Constitution of the United States of America and the Constitution of the State of North Carolina. The Plaintiff makes this Petition for Discretionary Review on grounds that said subject matter of this case not pertaining to the

aforementioned substantial questions and alleged violations has significant public interest, and this cause involves legal principles of major significance to the jurisprudence of the State. The Plaintiff also contends that the decision of the North Carolina Court of Appeals is in contradiction to precedents established by the North Carolina Court of Appeals and the North Carolina Supreme Court. The Plaintiff further contends that this decision appears likely to conflict with a decision of the North Carolina Supreme Court. In further support of this Petition for Discretionary Review, Plaintiff shows unto the North Carolina Supreme Court that this Petition for Discretionary Review was timely filed and same was served upon the North Carolina Court of Appeals, Chair of the North Carolina Industrial Commission and the Defendant as prescribed by the aforementioned Rule. This Petition for Discretionary Review is further supported by the following incorporated Memorandum of Law.

In an interlocutory matter, the Plaintiff, pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure, hereby respectfully petitions and moves the Supreme Court of North Carolina, with notice to the Court of Appeals of North Carolina, the North Carolina Industrial Commission and the Defendant, to certify for discretionary review the judgment of the North Carolina Court of Appeals entered 14 November 2007 (North Carolina Court of Appeals File No.: P07-907) denying the Plaintiff's Petition for Writ of Mandamus, Prohibition and Supersedeas. The Plaintiff makes this Petition for Discretionary Review on grounds that the subject matter of this case has significant public interest, and this cause involves legal principles of major

significance to the jurisprudence of the State. The Plaintiff also contends that the decision of the North Carolina Court of Appeals is in contradiction to precedents established by the North Carolina Court of Appeals and the North Carolina Supreme Court. The Plaintiff further contends that this decision appears likely to conflict with a decision of the North Carolina Supreme Court. This Petition for Discretionary Review is further supported by the following incorporated Memorandum of Law.

PETITION FOR WRIT OF SUPERSEDEAS

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Plaintiff, pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure, hereby respectfully petitions and moves the Supreme Court of North Carolina, with notice to the Court of Appeals of North Carolina, the North Carolina Industrial Commission and the Defendant, to issue a Writ of Supersedeas in order to preserve the record pending this appellate review. In support of this petition, the Plaintiff shows that immediate and irreparable harm has occurred which prejudices the rights of the Plaintiff in this matter before the Plaintiff could duly be heard in opposition, and the appeal bond submitted herewith is not adequate security to prevent further prejudice and any additional immediate and irreparable harm. The Plaintiff further shows that extraordinary circumstances make it impracticable to obtain a stay by deposit of security or application to the North Carolina Court of Appeals or the North Carolina

Industrial Commission. To show good cause in support of this motion, the Plaintiff shows that this petition and the aforementioned Notice of Appeal of Right and Petition for Discretionary Review are before the North Carolina Supreme Court and proper jurisdiction for this Petition for Writ of Supersedeas is with the North Carolina Supreme Court. The Plaintiff further shows that this matter was already duly presented before the North Carolina Court of Appeals and the North Carolina Court of Appeals has ruled on the matter by order entered 14 November 2007 (North Carolina Court of Appeals File No.: P07-907), a copy of which is attached hereto. This Petition for Writ of Supersedeas is further supported by the following incorporated Memorandum of Law.

MEMORANDUM OF LAW IN SUPPORT OF THIS NOTICE OF APPEAL OF RIGHT FROM THE NORTH CAROLINA COURT OF APPEALS TO THE NORTH CAROLINA SUPREME COURT UNDER G.S. 7A-30 AND PETITION FOR DISCRETIONARY REVIEW ON CERTIFICATION BY THE NORTH CAROLINA SUPREME COURT UNDER G.S. 7A-31

STATEMENT OF THE CASE

Plaintiff filed an Affidavit of Tort Claim with the North Carolina Industrial Commission asserting damages incurred as a result of the negligent actions of North Carolina State University, et al., represented by the Office of the Attorney General of North Carolina (hereinafter the "Defendant"), on 30 December 2005.

On 9 March 2006, the Defendant served the Plaintiff with the Defendant's First Set of Interrogatories and Request for Production of Documents to the Plaintiff (the "Defendant's Discovery Request"). The Plaintiff served the Defendant with the Plaintiff's Response to the Defendant's First Set of Interrogatories and Request for Production of Documents (the "Plaintiff's Discovery Response") and also served the Defendant with the Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant (the "Plaintiff's Discovery Request") on 1 May 2006. At the time of service, the Plaintiff invited the Defendant, in writing, to create a plan for outstanding discovery and the disclosure of certain medical records requested by the Defendant, which were not provided with the Plaintiff's Discovery Response. The Plaintiff also made reference to a press release, dated 31 January 2006, announcing the renovation of certain facilities owned, operated and maintained by the Defendant, which were repeatedly the subject of requests in the Plaintiff's Discovery Request. The Defendant did not respond to this invitation or make any reference to the allegation of the planned renovation. On 31 May 2006, the Defendant contacted the Plaintiff and the parties mutually agreed, in writing, to extend the Defendant's time to respond to the Plaintiff's Discovery Request up to and until 30 June 2006. The Defendant did not, however, provide any response.

The Defendant filed a Motion for Summary Judgment and Motion to Suspend Discovery on 20 July 2006. In pertinent part, the Defendant presented the legal argument that the employer-

employee relationship that existed between the Plaintiff and the Defendant in this matter barred the jurisdiction of this claim under the North Carolina Tort Claims Act and provided that the exclusive jurisdiction of this claim is under the North Carolina Workers' Compensation Act. The Plaintiff filed a Cross-Motion to Compel the Defendant to respond to the Plaintiff's Discovery Request, as well as a Response to the Defendant's Motion on 11 August 2006. In pertinent part, the Plaintiff contended that the Defendant failed to show that the injury "arose by accident out of and in the course of the employment", the Plaintiff was denied the right to continue to collect evidence to show the true nature of the injury in question through discovery and that the injury in fact did not "arise by accident out of and in the course of the employment". The Plaintiff also noted that the Defendant planned the renovation of certain facilities, and that, without adequate discovery responses from the Defendant, the renovation would prejudice the Plaintiff in this matter. The North Carolina Industrial Commission did not rule on the Plaintiff's Cross-Motion to Compel.

On 9 February 2007, the North Carolina Industrial Commission, by Wanda Blanche Taylor, Deputy Commissioner, dismissed this action with prejudice. The Plaintiff appealed of right for Full Commission review. On 10 August 2007, the North Carolina Industrial Commission, by and through the Full Commission Review Panel, by Christopher Scott, Chair of the Review Panel and Commissioner, Buck Lattimore, Chairman and Commissioner, and Dianne Sellers, Commissioner, presiding, affirmed the dismissal of this claim, which was modified to

dismiss this claim without prejudice and provide the Plaintiff leave of one (1) year to file a claim under the North Carolina Workers' Compensation Act. Plaintiff timely filed a notice of appeal of right to the Court of Appeals from said order on 10 September 2007. Confirmation of receipt and timely and proper filing of the notice of appeal was sent to the attention of all parties hereto on 24 September 2007. On 30 October 2007, the Plaintiff filed a Petition for Writ of Mandamus, Prohibition and Supersedeas, with an Incorporated Petition for an Immediate Change of Venue and New Trial with the North Carolina Court of Appeals. The Court of Appeals denied the Plaintiff's Petition by order entered on 14 November 2007. On 20 May 2008, the Court of Appeals entered an order which affirmed the dismissal of this claim.

STATEMENT OF THE FACTS

Prior to 1999, the University of North Carolina System General Administration and Board of Governors, which presides over sixteen (16) constituent institutions, one of which is the Defendant's university, North Carolina State University (the "UNC System Administration") proposed more than $3 BILLION DOLLARS in capital improvements to said constituent institutions under the jurisdiction thereof. The North Carolina General Assembly required the UNC System Administration to prepare a comprehensive profile of facilities and a detailed budget proposal for a ten (10) year capital plan for each of said constituent institutions. In December 1999, North Carolina State University published a certain Facility Profile and Ten-Year Capital Plan, compiled by Eva Klein &

Associates, Ltd., in December 1999 (hereafter referred to as the "Facility Profile" or "NCSU Facility Profile"), in compliance with this mandate. In pertinent part, independent building inspectors found that "...[t]wenty-five years is when a building needs major renovations...[f]ifty-eight [58%] percent of the buildings on-campus are older than [twenty-five] 25 years and only [ten] 10[%] percent of them have been renovated [leaving over fifty (50%) percent of buildings in need of major renovations]." This document also notes that "...[t]wenty-six [26%] percent of the buildings have no air conditioning, [thirty-two] 32[%] percent are air conditioned with inefficient air conditioning systems and these are primarily on the Centennial Campus", "[a]sbestos removal, environmental controls, and safety issues are the biggest problems we need to address", "[w]e prepare teachers on this campus in facilities that are not comparable to the facilities they will have in the high schools", "[w]e are allowing programs to exist that have serious safety issues...[w]e need the right facilities to take care of current enrollments". Along with budget estimates of over $46 million dollars to remedy and renovate deficiencies in the dormitories alone, as a portion of the proposed estimate of over $500 million to address the deficiencies in over fifty (50%) percent of the University facilities, it is noted that exposure to hazards, be they asbestos, mold, lead paint or other identified and known hazards, pursuant to the independent investigation mandated by the General Assembly for all schools under the jurisdiction of the Board of Governors, were and are documented in various facilities which were frequented by the Plaintiff in his tenure at North Carolina State University, including, but not limited

to, D.H. Hill Library, Withers Hall, Daniels Hall, Tompkins Hall, and Metcalf Hall.

In August 1999, the Plaintiff became a student at the Defendant's University, and frequently utilized various facilities, including, but not limited to, D.H. Hill Library, Withers Hall, Daniels Hall, Tompkins Hall, and Metcalf Hall. From January 2001 until May 2001, the Plaintiff resided in Metcalf Hall as a tenant and resident. From August 2002 until May 2003 and again from August 2003 until September 2003, the Plaintiff resided in Wood Hall as a tenant and resident and was simultaneously employed as a Resident Advisor in the same facility. At all times between August 1999 and May 2004, the Plaintiff was a student at the Defendant's University. In October 2001, the Plaintiff suffered an acute respiratory infection. On 11 July 2002, the Plaintiff enlisted as an Active Duty member of the United States Navy Reserve. Physical evaluation of the Plaintiff conducted immediately prior to said enlistment showed that the Plaintiff was fit and medically qualified for military service. In August 2002 until September 2003, the Plaintiff suffered a chronic respiratory infection while residing in and utilizing said facilities owned, operated and maintained by the Defendant. The Plaintiff entered into dialogue with the Defendant regarding conditions prevalent in the Defendant's facility, however, a dispute arose and the Plaintiff resigned from his employment position and vacated the premises at Wood Hall on 18 September 2003. In November 2003, and after extensive testing, medical experts determined that the Plaintiff had developed an asthmatic condition as a result of the respiratory infections and the indoor environmental hazard

exposure. The Plaintiff documented evidence concerning this dispute and transmitted same to the Office of the Governor of North Carolina in December 2003. On 20 January 2004, the North Carolina Department of Health and Human Services, on behalf of the Office of the Governor of North Carolina and the Government of North Carolina, and all public, private and quasi-public entities subject to the jurisdiction thereof (hereinafter collectively referred to as the "State") confirmed receipt of said documentation and represented that an investigation had been initiated. In April 2005, the United State Navy determined that the asthmatic condition disqualified the Plaintiff for military service, and the Plaintiff's enlistment contract was terminated five (5) years early. As a result, the Plaintiff incurred significant monetary damages. These damages are the primary grounds for this cause of action. No further communication or correspondence was exchanged between the Plaintiff, Defendant or the State after 20 January 2004.

JUSTIFICATION FOR THE NOTICE OF APPEAL OF RIGHT FROM THE NORTH CAROLINA COURT OF APPEALS TO THE SUPREME COURT UNDER G.S. 7A-30

In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the General Assembly followed the basic principle that there should be only one trial on the merits and one appeal on the law, as of right, in every case. Consequently, double appeals as of right -- first to the Court of Appeals and then to the Supreme Court -- are authorized only in the

instances specified by this section. *State v. Cumber*, 280 N.C. 127, 185 S.E.2d 141 (1971). When the Supreme Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by G.S. 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of the Court of Appeals is before the Supreme Court for review. The Supreme Court inquires into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Its inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in the Supreme Court, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to the Supreme Court. Supreme Court review of a decision by the Court of Appeals upon an appeal from it to the Supreme Court as a matter of right, pursuant to this section, is similarly limited. *State v. Williams*, 274 N.C. 328, 163 S.E.2d 353 (1968).

The constitutional question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. An appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*,

393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); *Bundy v. Ayscue*, 276 N.C. 81, 171 S.E.2d 1 (1969).

This section requires that an appellant must either allege and show the existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination or suffer dismissal. *Thompson v. Thompson*, 288 N.C. 120, 215 S.E.2d 606 (1975).

Respondent's appeal based solely on the assertion that the district court's allowance of an amendment to a juvenile petition deprived him of a constitutional right was dismissed by the Supreme Court, *ex mero motu*, because it did not directly involve a substantial constitutional question within the meaning of this section. *In re Jones*, 279 N.C. 616, 184 S.E.2d 267 (1971).

Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Mitchell*, 276 N.C. 404, 172 S.E.2d 527 (1970); *State v. Cumber*, 280 N.C. 127, 185 S.E.2d 141 (1971).

The Supreme Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court, unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief. *State v. Mitchell*, 276 N.C. 404, 172 S.E.2d 527 (1970).

Once involvement of a substantial constitutional question is established, the Supreme Court will retain the case and may, in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented for review. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); *Bundy v. Ayscue*, 276 N.C. 81, 171 S.E.2d 1 (1969).

The Supreme Court will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was timely raised and passed upon in the trial court if it could have been, or in the Court of Appeals if the question arose after trial. *State v. Parrish*, 275 N.C. 69, 165 S.E.2d 230 (1969).

The Plaintiff shows that the Plaintiff timely filed and duly and properly presented pleadings in protest of the Defendant's Motion for Summary Judgment, to show that the Plaintiff is not subject to and in compliance with the North Carolina Workers' Compensation Act, despite the existence of an employer-employee relationship between the Plaintiff and Defendant.

The Plaintiff contends that the North Carolina Industrial Commission failed to make a finding of fact as the injury in question in this claim, failed to acknowledge the Plaintiff's right to assert a claim under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), and failed to address the Plaintiff's contention that the injury in question did not "arise by accident out of and in the course of the employment". Instead, the Commission dismissed the Plaintiff's claim solely on grounds that an

employer-employee relationship existed by order entered 9 February 2007. By entry of said order, the Plaintiff asserts that the trial court violated his rights under the Constitution of the United States and the Constitution of the State of North Carolina.

The Plaintiff timely appealed and duly and properly presented before the North Carolina Court of Appeals said substantial questions and alleged violation by the docketing and filing of the Record on Appeal on 14 December 2007 and pleadings filed 28 December 2007 and 7 March 2008. In pertinent part, the Plaintiff presented the following precedents from the Appellate Division of the North Carolina Judicial System.

The social policy behind the Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers. Although the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 345 S.E.2d 374 (1986). The threefold conditions antecedent to the right to compensation under the Act are: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. *Wilson v. Town of Mooresville*, 222 N.C. 283, 22 S.E.2d 907 (1942). An employee must also establish a fourth essential element, that his injury caused him disability, unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power. *Hollman v.*

City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968). The primary purpose of workers' compensation is to compensate injured employees for their loss of earning capacity at approximately their present standard of living and maintain said standard of living so long as the injury continues to effect earning capacity, not to compensate for pain and suffering. *Richardson v. North Carolina Department of Correction*, 345 N.C. 128, 478 S.E.2d 501. Also see *Rhinehart v. Roberts Super Mkt., Inc.*, 271 N.C. 586, 157 S.E.2d 1 (1967). The fact that plaintiff sustained an injury is a critical fact upon which her right to compensation depends; thus, a specific finding of that fact is required by the Commission. *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985). More must be shown than an injury while at work to sustain a claim for compensation. *Hargus v. Select Foods, Inc.*, 271 N.C. 369, 156 S.E.2d 737 (1967). To be compensable an injury must spring from the employment or have its origin therein. *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964). Also see McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934). The intent of the Act is to base compensation upon the normal income which the employee derived from his employment. *Lovette v. Reliable Mfg. Co.*, 262 N.C. 288, 136 S.E.2d 685 (1964). It seems reasonable that the legislature, having placed the economic loss caused by a worker's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971).

When an effective administrative remedy exists, that remedy is exclusive. However, when the relief sought differs from the statutory remedy provided, an administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court. *Johnson and Smith v. First Union Corporation*, 128 N.C. App. 450, 496 S.E.2d 1 (1998). With regard to the Act, the incidence of the law is on the status created by the contract of employment. It deals with the incidents and risks of that employment, in which concededly is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common law or other rights which pertain to the parties only as members of the general public, disconnected with the employment. Expressions in the Act regarding the surrender of the right to maintain common law or statutory actions against the employer are not absolute -- not words of universal import, making no contact with time, place, or circumstance. They must be construed within the framework of the Act, and as qualified by its subject and purposes. The North Carolina Workmen's Compensation Act relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation. Where that relation does not exist the Act has no application. Where the employer and the employee are subject to and have accepted and complied with the provisions of the Act, the rights and remedies therein granted to the employee exclude all other rights and remedies in his favor against the employer. N.C. Gen. Stat. § 97-10.1. The Act does not, however, take away any

common law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public. *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1984).

The Court of Appeals has held that findings of fact must be made for claims under the Workers' Compensation Act in *Jackson*, finding of fact must be made pertaining to disability under the Act in *Wallace*. Further, the Court of Appeals has held that it is a violation of a claimant's rights under the Constitution of the United States and the Constitution of the State of North Carolina to deny even an employee a claim against his employer where the injury is one that is not connected to the employment in *Brown* and *Johnson*.

This Supreme Court also held that findings must be found on the injury and on any compensable disability under the Act in *Wilson*, *Hollman* and *Lovette*. This Supreme Court further held that said findings must show a causal connection between the injury and the employment in *Perry* and *Hargus* and applied same in *Hendrix*.

Notwithstanding, the Court of Appeals found that a prisoner was only entitled to remedy under the Act for an injury which arose by accident out of and in the course of his prison job in *Richardson*. The Court determined that the fact that the injury did not result in a compensable disability at the time of the injury was not grounds for the Act to be considered not in full force and effect.

Notwithstanding, the Court of Appeals found that a student-apprentice was subject to and complied with the provisions of the Act in *Ryles v.*

Durham County Hospital Corporation, Inc.; 107 N.C. App. 455; 420 S.E.2d 406 (1992). While the injury clearly arose by accident out of and in the course of the apprenticeship, no findings were made to show that this injury resulted in a compensable disability. [*Id.*] In addition, the Court of Appeals found that "[t]he job status of apprentice medical-related personnel is highly problematic and usually must be determined not only on a case-by-case basis but also with special regard to relevant statutory provisions. . . [t]hough possibly and seemingly incongruous, a lab technician trainee could be considered a student for some purposes and an employee for others". [*Id.*]

Notwithstanding, the Court of Appeals affirmed the dismissal of a claim pertaining to the claimant's right to maintain a common law claim against his employer as the claimant failed to meet the burden of proof for a *Woodson* claim in *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 593 S.E.2d 416 (2004). The claimant failed to make additional defenses, such as the fact that the injury was not an industrial accident, nor defined as an occupational disease under the Act. The claimant also did not apply the test in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-4, 301 S.E.2d 359, 365 (1983), to challenge the classification of this injury under the Act.

In the instant case, the Plaintiff contends that the North Carolina Court of Appeals failed to find error in the absence of any finding of fact as the injury in question in this claim by the North Carolina Industrial Commission, failed to acknowledge the Plaintiff's right to assert a claim under *Woodson*, and failed to address the Plaintiff's contention that the injury in question did not "arise by accident out of and in the course of the

employment" and did not result in a compensable disability under the Act. Instead, the Court affirmed the decision to dismiss this Plaintiff's claim solely on grounds that an employer-employee relationship existed. The Plaintiff contends that the Court of Appeals and this Supreme Court have already acknowledged the statutory shortfalls in the adjudication of claims where an employer and employee maintains a relationship outside of the scope of the employment, and the duty of care required of the employer to the employee for each respective relationship. In the instant case, the duty of care required of the employer which was breached was that of the university-student and landlord-tenant-resident. The academic studies and the tenancy of the Plaintiff was not within the scope of the employment, but outside of the scope of the employment, and, where applicable, a form of compensation for the employment. In addition, the Court of Appeals has held that when the relief sought differs from the statutory remedy provided, an administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court. Whereas the injury of the Plaintiff did not result in a compensability disability under the Act, the Act did not provide the relief sought by the Plaintiff, and thus, the administrative remedy should not bar a claimant from pursuing an adequate remedy in civil court. Moreover, whereas the Plaintiff presented evidence to show a prima facie case to show there is a genuine issues of material fact and triable issues as to the effectiveness of the administrative remedy provided by the Act in the instant case, the evidence presented by the Defendant must show that the administrative remedy is effective with respect to the

injury, regardless of the status of employment, in order to survive the Plaintiff's contention. Therefore, a finding of fact on the injury is required by the Court, otherwise the Court has not made an adequate finding of the fact to support the dismissal of this claim.

Given the foregoing, it appears that this appeal of right not only presents substantial questions and alleged violations of the Plaintiff's rights under the Constitution of the United States and the Constitution of the State of North Carolina, but that these substantial questions have not already been the subject of conclusive judicial determination. The Plaintiff asserts that this Notice of Appeal of Right is appropriate and justified and that this appeal should be heard before this Supreme Court.

JUSTIFICATION FOR THE PETITION FOR DISCRETIONARY REVIEW ON CERTIFICATION BY THE NORTH CAROLINA SUPREME COURT UNDER G.S. 7A-31

The Supreme Court may review the entire proceedings and consider any errors which have occurred during the course of the litigation, provided that the parties have taken the proper steps to preserve the questions for appellate review. *Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E.2d 649 (1974).

Statute could not have restricted the Supreme Court of North Carolina's constitutional authority under N.C. Const., Art. IV, § 12(1) to exercise jurisdiction to review upon appeal any decision of the courts below, and as such, the Supreme Court of North Carolina did not hesitate to exercise its rarely

used general supervisory authority when necessary to promote the expeditious administration of justice, and did so to consider questions that were not properly presented according to its rules; this exercise of supervisory authority was particularly appropriate when prompt and definitive resolution of an issue was necessary to ensure the uniform administration of North Carolina's criminal statutes. *State v. Ellis*, 361 N.C. 200, 639 S.E.2d 425 (2007).

Under this section, the Supreme Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by the Supreme Court. *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 194 S.E.2d 133 (1973).

The failure of Plaintiff to petition for a writ of certiorari to review the interlocutory decree of the Court of Appeals does not preclude the Supreme Court from granting certiorari after final judgment and thereupon considering and rectifying any errors which occurred at any stage of the proceedings. *Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E.2d 649 (1974).

Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so. The general purpose of discovery is to assist in the disclosure prior to trial of any relevant unprivileged materials and information. Such exchanges help the parties narrow and sharpen the basic facts and issues prior to trial. *Burge v. Integon General Ins. Co.*, 104 N.C. App. 628, 630, 410 S.E.2d 396, 398 (1991). Thus, motions for

summary judgment generally should not be decided until all parties are prepared to present their contentions on all the issues raised. *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 441, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

A temporary injunction will ordinarily be granted pending trial on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is a reasonable apprehension of irreparable loss unless injunctive relief is granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's rights. *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634, 190 S.E.2d 729 (1972); *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693, *cert. denied*, 312 N.C. 495, 322 S.E.2d 559 (1984).

Ordinarily, to justify the issuance of a preliminary injunction it must be made to appear that (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation. *Setzer v. Annas*, 286 N.C. 534, 212 S.E.2d 154 (1975); *Pruitt v. Williams*, 25 N.C. App. 376, 213 S.E.2d 369, *appeal dismissed*, 288 N.C. 368, 218 S.E.2d 348 (1975); *Waff Bros. v. Bank of N.C., N.A.*, 25 N.C. App. 517, 214 S.E.2d 261 (1975), *rev'd on other grounds*, 289 N.C. 198, 221 S.E.2d 273 (1976); *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E.2d 700 (1978); *Howard Schultz & Assocs. v. Ingram*, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

A preliminary injunction will be issued only if plaintiff is able to show the likelihood of success on the merits of his case and if plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of plaintiff's rights during the course of litigation. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983).

Although the wording of the prayer for relief in a complaint and the wording in the notice to show cause did not technically follow the language of this rule, the meaning was clear and unambiguous and sufficient to constitute a motion for a preliminary injunction. *Collins v. Freeland*, 12 N.C. App. 560, 183 S.E.2d 831 (1971).

Both before and after the adoption of the Rules of Civil Procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and subdivision (1) of G.S. 1-485 does not prohibit this. *State ex rel. Morgan v. Dare to Be Great, Inc.*, 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under subdivision (1) of G.S. 1-485 for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. *State ex rel. Morgan v. Dare to Be Great, Inc.*, 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Verification of a complaint is not a condition for issuance of a preliminary injunction under this rule. *Moore v. Wykle*, 107 N.C. App. 120, 419 S.E.2d 164, *cert. denied*, 332 N.C. 666, 424 S.E.2d 405 (1992).

Preliminary injunction, unlike a temporary restraining order, requires notice to the adverse party and a hearing. *Jolliff v. Winslow*, 24 N.C. App. 107, 210 S.E.2d 221 (1974), *appeal dismissed*, 286 N.C. 545, 212 S.E.2d 656 (1975).

A preliminary or interlocutory injunction can only be issued after notice and a hearing, which affords the adverse party an opportunity to present evidence in his behalf. *Lambe v. Smith*, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

The prayer for relief in a complaint may constitute a sufficient motion for a preliminary injunction, and a separate or additional motion is not necessarily required. *Collins v. Freeland*, 12 N.C. App. 560, 183 S E.2d 831 (1971).

An injunction under this rule is a temporary order pending trial; thus the affidavits need not meet as high a standard as those for a summary judgment ruling. *Howard Schultz & Assocs. v. Ingram*, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

In reviewing orders for temporary injunctive relief an appellate court may look beyond the findings of fact made by the trial court and determine from the evidence whether a preliminary injunction is justified. *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634, 190 S.E.2d 729 (1972).

On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge, but may review and weigh the evidence and find the facts for itself. *Setzer v. Annas*, 286 N.C. 534, 212 S.E.2d 154 (1975); *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975);

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

The scope of appellate review in the granting or denying of a preliminary injunction is essentially de novo. An appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

The Constitution of North Carolina, Art. IV, sec. 8, provides that this Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." The defendant has docketed in this Court the record proper on the appeal and has asked that a supersedeas issue from this Court to the end that the child may be kept in the State pending the appeal, upon the ground, as held in *Harris v. Harris*, 115 N.C. 587, 20 S.E. 187, that the court will not award such custody, pending an appeal, to a parent who lives out of the State, because, while the bond might possibly secure the payment of damages, it could not secure the production of the child, and therefore the appellant might find his appeal futile. This case is cited with approval in *In re Turner*, 151 N.C. 474, 66 S.E. 431, and *Moore v. Moore*, 130 N.C. 333, 41 S.E. 943. *Page v. Page*, 166 N.C. 90; 81 S.E. 1060;

When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon

deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the Writ of Supersedeas may be made to the appellate court in the first instance. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order. Rule 8 of the North Carolina Rules of Appellate Procedure.

It is well established that the dismissal of a petition indicates a failure to comply with the technical standard, such as timeliness or the rules of the Court, while a denial of a petition indicates that the grounds for the petition were inadequate or the petition was without merit. Whereas the Court of Appeals denied the Plaintiff's Petitions for Writ of Mandamus, Prohibition and Supersedeas, the Plaintiff asserts that the Court of Appeals found same to be without merit or made on inadequate grounds.

Pursuant to the North Carolina Rules of Appellate Procedure, it is well established that an action pending appellate review before the North Carolina Court of Appeals or the North Carolina Supreme Court acts as a stay and supersedeas until final judgment is rendered by the presiding appellate court.

Pursuant to Rule 15(c) of the North Carolina Rules of Appellate Procedure, the Plaintiff shows that (1) the subject matter of the appeal has significant public interest, (2) the cause involves legal principles of major significance to the jurisprudence of the State, and (3) the decision of the Court of Appeals appears to be in conflict with previous precedents and decisions of the Supreme Court.

The Plaintiff asserts that the subject matter of this appeal has significant public interest. Not only does this appeal involve $1.5 BILLION DOLLARS in capital improvements and the reported $750 MILLION DOLLARS in infrastructure improvements, remediation and renovations, but this appeal also involves the disproportionate responses of the State to the alleged indoor environmental hazards between North Carolina State University, North Carolina Central University, and University of North Carolina at Pembroke. Not only did the UNC System Administration find that remediation and renovations were needed at every one of the sixteen (16) constituent institutions at a sum of more than $3 BILLION DOLLARS in 1999, but, in 2003, North Carolina Central University required, at minimum, $26 MILLION DOLLARS to correct various indoor environmental hazards, and University of North Carolina at Pembroke required $3.5 MILLION DOLLARS to correct various indoor environmental hazards. In addition, during the pendency of these proceedings, the State settled for $1.5 MILLION DOLLARS with various private companies who constructed certain facilities at North Carolina Central University. The State originally was seeking more than $7 MILLION DOLLARS for the total costs

of the renovations of the facilities in question. Further, certain officials of the State made representations before the media that there was no evidence of adverse health effects for students, staff and faculty, which directly contradicts information obtained by the United States Environmental Protection Agency, the State and the Plaintiff. Finally, the evidence of record suggest that the Defendant and the State arranged for the renovation of Wood Hall after the filing of the Plaintiff's claim in order to destroy evidence and avoid providing the Plaintiff with the opportunity to inspect the physical matter and premises through the discovery process. While the Plaintiff can appreciate the actions of the State and Defendant to expediently remedy any and all deficiencies present in the aforementioned facilities, the Plaintiff contends that the Plaintiff has rights under the law in this matter, and that same should be properly adjudicated before the Court of competent jurisdiction.

The Plaintiff asserts that this cause of action involves legal principles of major significance to the jurisprudence of the State. In addition to the contentions previously duly presented herein, the Plaintiff further shows that the Plaintiff presented evidence before the North Carolina Court of Appeals to show that the North Carolina Industrial Commission disregarded competent evidence timely, duly and properly presented and failed to comply with the Rules of the Court prescribed by the North Carolina General Assembly and this Supreme Court.

As previously duly presented herein, the Plaintiff asserts that the decision of the Court of Appeals appears to be in conflict with previous precedents and decisions of the Supreme Court. In

addition to the substantial questions and alleged violations of the rights of the Plaintiff under the Constitution, the Plaintiff further shows that both the North Carolina Industrial Commission and the North Carolina Court of Appeals failed to properly preserve the record in this matter by intervening on behalf of the Plaintiff to prevent the destruction of evidence crucial to this cause of action. Further, in order to show good cause in support of these allegations and assertions, and in consideration of the fact that the Plaintiff has been deprived of the right to collect additional information relating to this cause of action through discovery, the Plaintiff has included articles from the news media which corroborate the allegations and assertions made herein that are not part of the current record. The Plaintiff prays this Supreme Court will review the exhibits attached hereto in consideration of the depravity suffered by the Plaintiff in this matter. In addition, the issue of the conduct of the Industrial Commission should also be addressed.

In consideration of the foregoing, the Plaintiff prays this Supreme Court certifies this matter for discretionary review and approves all of the legal issues to be briefed.

JUSTIFICATION FOR THE PETITION FOR WRIT OF SUPERSEDEAS

EXTRAORDINARY RELIEF IS APPROPRIATE TO PRESERVE THE RECORD IN THIS MATTER

The Plaintiff asserts that injunctive relief is proper in the instant case in order to preserve the record and prevent further prejudice and irreversible

and irreparable harm to the Plaintiff by the actions of the Defendant. In light of the foregoing, the Plaintiff prays that this Supreme Court will issue this Writ as previously requested.

LEGAL ISSUES TO BE BRIEFED

In the event this Court allows this Notice of Appeal of Right, the Plaintiff intends to present the following issues to this Supreme Court:

I. THE COMMISSION FAILED TO UPHOLD THE STANDARD OF REVIEW REQUIRING EXPLICIT AND CONCLUSIVE FINDINGS OF FACT ON EVERY CRUCIAL ISSUE, INCLUDING THE ALLEGED INJURY OF THE PLAINTIFF.

II. THE COMMISSION FAILED TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF AND FURTHER FAILED TO EXERCISE THE APPROPRIATE STANDARD OF REVIEW AND SCOPE OF REVIEW OF THE EVIDENCE PRESENTED.

III. THE FINDINGS OF FACT AND THE CONCLUSIONS OF LAW MADE BY THE COMMISSION ARE NOT IN ACCORDANCE WITH THE STANDARD OF REVIEW AND ARE NOT SUPPORTED BY THE EVIDENCE.

IV. THE COMMISSION VIOLATED THE FOURTEENTH AMENDMENT OF THE UNITED STATES BY DENYING THE PLAINTIFF THE RIGHT TO MAINTAIN A COMMON LAW CLAIM FOR CIVIL REMEDY WITHOUT ADEQUATE GROUNDS.

In the event this Court allows this Petition for Discretionary Review, the Plaintiff intends to

present the following legal issues to this Supreme Court:

V. THE COMMISSION FAILED TO ADDRESS THE CRUCIAL QUESTION OF THE PLAINTIFF'S OUTSTANDING DISCOVERY REQUEST PENDING RESPONSE FROM THE DEFENDANT AND DENIED THE PLAINTIFF A SUBSTANTIAL RIGHT TO SEEK DISCOVERY IN SUPPORT OF HIS CLAIMS AND DEFENSE AGAINST THE DEFENDANT'S MOTION TO DISMISS.

VI. THE PLAINTIFF WAS ENTITLED TO BE HEARD IN THE MATTER OF THE REQUEST FOR INTERVENTION AND INJUNCTION INCORPORATED INTO THE PLAINTIFF'S CROSS-MOTION TO COMPEL THE DEFENDANT TO RESPOND TO THE PLAINTIFF'S DISCOVERY REQUEST.

CONCLUSION

In conclusion, the Plaintiff prays this Supreme Court will allow the Plaintiff's Notice of Appeal of Right, certify this matter for discretionary review and issue a Writ of Supersedeas to preserve the record.

Respectfully submitted, this the 29th day of May 2008,

PLAINTIFF-APPELLANT-PETITIONER
/s/ JOSEPH KAMAU CHRISTOPHER BEY
[Pro Se]

APPENDIX L

SUPREME COURT OF NORTH CAROLINA
GENERAL COURT OF JUSTICE OF
NORTH CAROLINA

No. 246-P08

J. KAMAU CHRISTOPHER a/k/a
JOSEPH KAMAU CHRISTOPHER BEY,
PLAINTIFF-APPELLANT-PETITIONER

v.

NORTH CAROLINA STATE UNIVERSITY, ET AL.,
DEFENDANT-APPELLEE-RESPONDENT

DEFENDANT-APPELLEE-RESPONDENT'S
MOTION TO DISMISS, AND RESPONSE TO THE
PLAINTIFF-APPELLANT-PETITIONER'S NOTICE
OF APPEAL OF RIGHT, PETITION FOR
DISCRETIONARY REVIEW ON CERTIFICATION,
AND PETITION FOR A WRIT OF SUPERSEDEAS

APPEAL FROM
NORTH CAROLINA INDUSTRIAL COMMISSION,
NO. TA-19383

FILED MAY 29, 2008

NOW COMES the Defendant, and responds to Plaintiff's Notice of Appeal of Right, under N.C. Gen. Stat. § 7A-30, and Petition for Discretionary Review, under N.C. Gen. Stat. § 7A-31, and Petition for Writ of Supercedeas, and moves this Honorable Court to deny Plaintiff's petitions and dismiss the appeal in all respects, and in doing so, shows the following:

STATEMENT OF THE CASE

This tort claim was filed with the North Carolina Industrial Commission on December 30, 2005. Defendant timely answered and filed a motion to dismiss, and a motion for summary judgment, on the grounds that Plaintiff's exclusive remedy was to file a claim under the North Carolina Workers' Compensation Act, not the Tort Claims Act. (R pp. 6-9, 10-31) Plaintiff filed a response to the summary judgment motion. (R p. 32-177)

On February 9, 2007, Deputy Commission Taylor granted Defendant's motion for summary judgment, dismissing with prejudice Plaintiff's tort claim. (R p. 220) Plaintiff timely appealed to the Full Commission of the Industrial Commission. (R p. 224)

The Full Commission affirmed the Deputy Commissioner's ruling. (R p. 262) Plaintiff appealed to the North Carolina Court of Appeals, which affirmed the Full Commission's decision on May 20, 2008. *Christopher v. N.C. State Univ.*, No. COA07-1516, slip op. (N.C. Ct. App. May 20, 2008, with his notice of appeal to the Supreme Court and petitions for discretionary review and supersedeas.

STATEMENT OF THE FACTS

Plaintiff alleged in his tort claim that, inter alia, while he was enrolled at Defendant's university as a student and working as a Resident Advisor during September through November 2003, he was exposed to mold from an air conditioning system, and subsequently contracted a mold-related respiratory illness. Plaintiff alleged that he "subsequently became an employee and resident of University Housing facility as a Resident Advisor at Wood Hall." (R p. 2) No evidentiary hearing was held in this matter.

Plaintiff admitted in his pleadings that he was an employee of Defendant's during the time period he was allegedly exposed to mold, September through November 2003.

In his tort claim Affidavit, Plaintiff alleged that he "became an employee and resident of University Housing facility as a Resident Advisor at Wood Hall." (R pp. 2-3) During oral argument at the summary judgment hearing on November 9, 2006, when asked by the Deputy Commissioner if he were a student while at N.C. State University, Plaintiff stated, "[yes], I was. I was – I was a student, as well as an employee." (T p. 5)

Plaintiff admitted on Pages 16-17 of his August 11, 2006, brief that he was a temporary Resident Assistant employee of Defendant at the time of exposure. (R pp. 47-8) Plaintiff again admits that "[w]hile the Plaintiff does claim he is physically disabled . . . by an injury which manifested itself during the period of employment for the Defendant." (R p. 52)

On Page 3 of Plaintiff's Response to Defendant's Motion for Summary Judgment, Plaintiff states, ". . . while enrolled as a student at Defendant's university residing as a tenant and resident in facilities maintained by the Defendant, and employed as a temporary employee in the capacity of a Resident Advisor." (R p. 177) Plaintiff did not dispute that he had an Employment File with Defendant, and that certain documents presented by Defendant to the court came from his file. (R p. 185) Plaintiff admitted that he "voluntarily terminated and resigned from his position of Resident Advisor on September 18, 2003, which resignation occurred before the Plaintiff received verifiable medical evidence. . . " regarding his alleged medical condition. (R p. 191)

Plaintiff again admitted to being employed with Defendant during the relevant time period: While Plaintiff admits and acknowledges that his relationship with the Defendant included (sic) employer-employee arrangement, as defined by the Statutes, and thus he was employed with the Defendant during a period in which the alleged injury manifest itself, Plaintiff denies that his exclusive remedy is under the Workers' Compensation Act. (R p. 191)

Plaintiff was offered and accepted employment with Defendant as a Resident Advisor for the terms of August 9, 2002, through May 17, 2003; and again from August 5, 2003, through May 16, 2004. (R p. 17-19) An integral part of Plaintiff's compensation package was to reside in Wood Hall, where Plaintiff alleged that he was exposed to air-borne contaminants, i.e., mold. Plaintiff would not have been in close proximity to the alleged mold or air-

borne contaminants were it not for his employment with Defendant and him residing in Wood Hall as a Resident Advisor. (R p. 17-19)

Plaintiff was offered a Resident Advisor appointment in Wood Hall with Defendant on February 7, 2002, for the 2002-2003 academic year; he was paid an annual rate by Defendant to reside in Wood Hall; he signed a Resident Advisor Contract; and completed an "Employee's Withholding Allowance Certificate," and he responded to the needs of fellow students in Wood Hall, was on-call for emergencies in Wood Hall 24 hours a way, and carried out the general responsibilities of a Resident Advisor during the period complained of. (R p. 17-19)

Plaintiff entered into employment contracts with Defendant to be a Resident Advisor, providing him with monetary compensation. (R p. 21-7) Plaintiff completed W-4 Employee Withholding Allowance forms, along with Employment Eligibility Verification forms for Defendant. (R p. 28-30)

Plaintiff received a set salary of $1,200.00 a year for the first year as a Resident Advisor, and a rent-free, single occupancy room, telephone and internet services, among other perks. (R p. 17-19)

I. PLAINTIFF'S APPEAL UNDER § 7A-30 SHOULD BE DENIED.

First, Plaintiff does not have an appeal of right in from the Court of Appeals decision. Pursuant N.C. Gen. Stat. § 7A-30, a party may appeal as a matter of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: "(1) [w]hich directly involves a substantial question arising under the Constitution of the United States or of this State,

or (2) [i]n which there is dissent." N.C. Gen. Stat. § 7A-30 (2008).

First, Plaintiff's Industrial Commission claim, and the decision of the Court of Appeals, do not raise a State or Federal Constitutional question. In fact, the Industrial Commission does not have jurisdiction to hear claims alleging Constitutional violations. It has jurisdiction to hear only claims allowed by statute: where negligence is alleged against a State agency, pursuant to § 143-291 et seq.; and worker compensation claims under the Workers' Compensation Act, pursuant to § 97-1 et seq.

Appellate courts do not typically review constitutional questions unless the questions were raised and ruled upon in the trial courts. *State v. Mitchell*, 276 N.C. 404, 172 S.E.2d 527 (1970); *State v. Cumber*, 280 N.C. 127, 185 S.E.2d 141 (1971).

Plaintiff did not allege a Constitutional violation in his tort claim, or argue the issue before the Industrial Commission. (R p. 2-3) Nor did the Court of Appeals' decision address such an issue.

Second, Plaintiff has no right to appeal under Subsection (2) because there was no dissent in the Court of Appeals decision, which is required in order to appeal under § 7A-30(2). Therefore, Plaintiff's appeal under § 7A-30 should be dismissed and/or denied.

II. PLAINTIFF'S PETITION FOR DISCRETIONARY REVIEW SHOULD BE DENIED

Plaintiff petitions this Court under Rule 15 of the Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-31(c) to certify this matter for review to the Supreme Court. Under § 7A-31(c), certification may

be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court: 1) the subject matter of the appeal has significant public interest, 2) the cause involves legal principles of major significance to the jurisprudence of the State, or 3) the decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court. N.C. Gen. Stat. § 7A-31(c) (2007).

Plaintiff contends in the main that the Court of Appeals and Industrial commission erred when they held that Plaintiff's claim fell under the Workers' Compensation Act, and not the Tort Claims Act. Such an issue is not a matter of "significant public interest." Whether Plaintiff's claim is adjudicated as a tort claim or Workers' Compensation claim affects only Plaintiff's case. It will not affect public policy or members of the general public other than Plaintiff. For example, Plaintiff's claim does not implicate an environmental issue that may impact the public health of citizens of North Carolina. Nor does it invoke the federal or state Constitutions. Plaintiff's petition relates solely to whether the facts of his case invoke the subject matter jurisdiction of the Industrial Commission under the Tort Claims Act. In addition, Plaintiff's claim was dismissed with prejudice upon Defendant's summary judgment motion, because there is no genuine dispute regarding the material fact of Plaintiff being an employee of Defendant at the time he was allegedly exposed to mold. (R p. 220-23)

The Court of Appeals properly held that the Worker's Compensation Act is Plaintiff's exclusive remedy. Thus, the subject matter of Plaintiff's appeal does not have significant public interest.

Nor does Plaintiff's appeal involve "legal principles of major significance to the jurisprudence of the State." Pursuant to N.C. Gen. Stat. § 97-10-1, the Workers' Compensation Act is Plaintiff's sole remedy: If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death. N.C. Gen. Stat. § 97-10-1 (2007).

Plaintiff's appeal does not involve an issue of first impression. Indeed, the exclusivity provision of the Workers' Compensation Act is well established and has been litigated numerous times. See *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E.2d 806 (1964); *Fender v. GE Co.*, 260 F. Supp. 75 (W.D.N.C 1966); *Fender v. GE Co.*, 380 F.2d 150 (4th Cir. 1967); *Wright v. Wilson Mem. Hosp.*, 30 N.C. App. 91, 226 S.E.2d 225 (1976); *Horne v. GE Co.*, 716 F.2d 253 (4th Cir. 1983); *Dolbrow v. Holland Indus., Inc.*, 64 N.C. App. 695, 308 S.E.2d 335 (1983); *Freeman v. SCM Corp.*, 311 N.C. 294, 316 S.E.2d 81 (1984); *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985); *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. Cpp. 11, 510 S.E.2d 388 (1999); *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665 (2003).

In addition, Plaintiff cited no cases indicating that the decision of the Court of Appeals in this matter is in conflict with a decision of the Supreme Court. In contrast, the decision of the Court of

Appeals is in accord with this Court's prior rulings. See *Powers v. Robeson County Memorial Hospital, Inc.*, 242 N.C. 290, 87 S.E.2d 510 (1955) (holding that a student nurse's exclusive remedy was under the Workers' Compensation Act). Therefore, Plaintiff's petition for discretionary review should be denied.

III. PLAINTIFF'S PETITION FOR WRIT OF SUPERSEDEAS SHOULD BE DENIED.

Plaintiff also petitions this Court, pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure, for a writ of supersedeas to "preserve the record pending this appellate review." (Plaintiff's Brief, pp. 5, 36).

Generally, the purpose of the writ of supersedeas is to stay "execution or enforcement of any judgment, order or other determination of a trial tribunal which is not automatically stayed by the taking of appeal . . . " N.C. R. App. P. 23 (a)(1). However, enforcement of the Industrial Commission's decision and order was automatically stayed pursuant to N.C. Gen. Stat. § 143-294, which states: The appeal from the decision of the Industrial Commission to the Court of Appeals shall act as a supersedeas, and the State department, institution or agency shall not be required to make payment of any judgment until the questions at issue therein shall have been finally determined as provided in this Article. N.C. Gen. Stat. § 143-294 (2008). See also Tort Claims Rule T-308: "when a case is appealed to the Full Commission or the Court of Appeals, all decisions and orders of a Deputy Commissioner or the Full Commission are stayed pending appeal." Thus, Plaintiff's argument that a

writ of supersedeas should be granted is without merit.

CONCLUSION

For the reasons cited, Defendant respectfully requests that this Court deny Plaintiff's petitions and dismiss Plaintiff's appeal.

This the 11[th] day of June 2008

ROY COOPER
ATTORNEY GENERAL
/s/ DAHR JOSEPH TANOURY
DAHR JOSEPH TANOURY
Assistant Attorney General

APPENDIX M

EXCERPTS FROM EXHIBIT R TO THE PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUSPEND DISCOVERY

North Carolina State University
Facilities Profile and 10-Year Capital Plan
Eva Klein & Associates, Ltd.
December 1999

PREFACE

Purpose

In 1997 and 1998, the North Carolina General Assembly mandated that the Board of Governors of The University of North Carolina conduct a Study of Capital Equity and Adequacy and prepare a 10-Year Capital Plan—to identify capital needs of each institution for all categories of facilities.

This Facilities Profile and Capital Plan for North Carolina State University is one of 16 individual reports prepared from data developed in the Study. Its purpose is to summarize, in one place, all facilities-related information and capital needs for NC State from:

- Existing statistical data about the institution's mission, campus population, and campus facilities
- Campus Visit interviews and tours
- Compilation of 10-Year Capital Plan needs, based on the technical analyses conducted for the Study

- Organization of "Phase 1" (years 1-5) with a schedule of projects proposed for state funding and with a Matrix of Financing Responsibility, for all financing sources. . . .

North Carolina State University
10-Year Capital Plan Summary
Matrix of Financing Responsibility and Proposed Annual Schedule of Phase I State-Funded Projects . . . Total 10-Year Plan Needs 1,492,945,366 . . .

CAMPUS VISIT AND TOUR

Interview Comments

Mission. The general understanding of all interviewees was the role that NC State plays in economic development through the creation and dissemination of knowledge.

- Science, engineering technology, knowledge generation and dissemination, and teaching are our primary missions.
- We are more about economic development than any other institution in the State and it is a responsibility we accept.
- We have a statewide commitment to serve the citizens of North Carolina and not just through Agriculture Extension programs but through our entire Extension programs. A part of our research mission is to meet the needs of the State today.
- We have special relationships with the agriculture, forestry, textiles, and engineering communities. We have a statewide commitment to all these industries.

- We are basically the science and technology university of the state system. Service and extension of that research throughout the State is what sets us apart from the rest of the universities in the system.

Facilities Issues. Most interviewees expressed concern about the quality and quantity of the space that the campus has. In general the following statements describe the extent and size of the campus.

- There are 311 buildings on the campus comprising 9.4 million GSF. There are an additional 322 buildings located off-campus with 1 million GSF of space. These are just the buildings supported by appropriations.
- Receipts support 51 percent of the space on campus and only 49 percent is supported by the General Fund.
- Twenty-five years is when a building needs major renovations. Fifty-eight percent of the buildings on-campus are older than 25 years and only 10 percent of them have been renovated.
- Twenty-six percent of the buildings have no air conditioning, 32 percent are air conditioned with inefficient window units. Only 42 percent of the buildings have efficient air conditioning systems and these are primarily on the Centennial Campus.

Condition/Quality. Interviewees expressed concern about the poor condition of the main campus and the desire of everyone to move to the Centennial Campus.

- Centennial Campus has saved NC State. Without this campus, we would not be the institution we are today. The rest of the campus is constrained.
- We have labs on the main campus no better than you would find in secondary educational institutions.
- Teaching labs are the worst part of the problem. With the changes in technology, we are having a tough time keeping up.
- Asbestos removal, environmental controls, and safety issues are the biggest problems we need to address.
- We prepare teachers on this campus in facilities that are not comparable to the facilities they will have in the high schools.
- There is general lack of aesthetics and beauty on the campus. There is no landmark building. There is no special place that is a signature of the institution.
- We are allowing programs to exist that have serious safety issues. We need the right facilities to take care of current enrollments.
- We got a $1 million endowed chair and tried to hire the best person in the world to fill the position. He laughed at us because our facilities and infrastructure are so poor.

Capacity. Interviewees commented on the lack of teaching lab space for the sciences and overcrowded conditions in the student recreation areas.

- To serve the chemistry students, we had to divide them into two groups with lecture one week and labs the next week.

- Our research growth and partnering is exponential and we are having a tough time being able to accommodate everyone that wants to join with us.
- There are not enough classrooms to meet our needs. We have only started renovating classrooms in the last five years.
- There is severe shortage of space in the student areas. Also, we have a problem with trying to meet the needs of the community with this limited space.
- Our targeted enrollment is 31,000 students and we will need more space to accommodate this growth. Also, research space is relational with enrollment growth.

Land Issues. NC State has 103,000 acres throughout the State with only approximately 2,000 acres comprising the three main campuses. Land is held in three entities: State, endowment, and foundation lands. Only the foundation land is not tax-exempt.

Infrastructure. Given the size of the campus, interviewees at NC State expressed concern that the infrastructure of electrical, steam lines, water, sewer, and telecommunications is not counted as a part of the CRV of the campus. This method undervalues the true CRV and reduces the amount of funds available from R&R to address upkeep and repairs to these critical systems. (Note: In the April 1999 report to the Board of Governors, EKA has recommended this change—to add infrastructure CRV to the R&R Reserve formula.)

Staffing and Budget. Interviewees expressed concern about the move by the General Assembly to

use part of the R&R funds to help pay for the Technology Infrastructure Expansion program. It was felt that this sets a dangerous precedent for using R&R funds for purposes other than those for which the money was designated originally. Concern was expressed that the R&R funds are insufficient to address the deferred maintenance needs . . .

APPENDIX N

EXHIBIT A TO THE PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUSPEND DISCOVERY

MEMORANDUM

Administrative Memo
NC State University
Residence Halls

Submitted by: J. Christopher[;] Title: RA
Date: 10/08/2002[;] Time: 4:00 AM
Building: Wood Hall A[;] Room #209H
Phone #512-1859

Date of Incident: 9/23/02-Present[;] Time: n/a
Location (Building)(Room): Wood Hall
Subject(s) Involved: [NAMES REDACTED]

On Tuesday, September 24, 2002, [NAME REDACTED] was experiencing sore throat and labored breathing. He went to the Student Health Center where they performed a number of test and found no diseases. He was given an antibacterial mouthwash for the sore throat and sent home. Two days later on Thursday, September 26, 2002, [NAME REDACTED] was taken to the hospital with an enflamed tonsil. The tonsil was [protruding] out of his throat and also preventing breathing. The doctors at Wake Med gave [NAME REDACTED] [Novocain] and gave him ten incisions in his tonsil to let the

infection that enlarged the organ drain out. Wake Med also put [NAME REDACTED] on [penicillin].

On Saturday, September 28, [NAME REDACTED] was taken the hospital. He was treated and tested for various diseases and all test came up negative. He was admitted overnight, given a cat scan and administered Morphine and other pain killers for the migraine headaches. [NAME REDACTED] also experienced [weight loss], loss of appetite, [vomiting], nausea and flu like symptoms.

On Monday, September 30, 2002, Resident Advisor J Christopher was experiencing migraine headaches, shortness of breathe, clogged sinus conditions, flu like symptoms, coughing, loss of appetite, loss of over fifteen pounds after already being underweight, [vomiting] and nausea. He missed all of his morning classes that day and went to the Student Health Center. After drawing four viles of blood and taking a urine test, the Student Health Center found no identified diseases, but did notice significant [weight loss] and a viral strand in the blood. Blood cell counts were normal eliminating mono or any other typical viral disease. Later that day, [NAME REDACTED] informs Wood Hall Resident Advisor J Christopher that her air conditioning unit in her room was growing mold and mildew. [NAME REDACTED] had been experiencing similar ailments without cause and was concerned. [NAME REDACTED] also noticed the smell of the mildew and mold when she entered the suite.

[NAME REDACTED] complained of nausea, headaches, sore throat and shortness of breathe to do a restricted air canal. Her parents removed her from the building on Thursday, October 3, 2002. While picking up her up, her father noticed the smell of

mildew and mold. While away from the building, her condition drastically improved. When she returned with her father, he opened the air conditioning unit and attempted to clean the green growth inside.

On October 2, 2002, [NAME REDACTED] was experiencing light-headedness, headaches and flu like symptoms after visiting for two hours in the middle afternoon.

[NAME REDACTED] receives allergy shots every week. Last week, the doctor at the Student Health Center refused to give her an allergy shot because of her enflamed tonsils. She was also experiencing nausea, sore throat and headaches. The doctor recommended that she take penicillin to combat the [inflammation] and if it did not clear up, she would be given an antibacterial mouthwash this week.

[NAME REDACTED] experienced chronic coughing. [NAME REDACTED] experienced sore throat and enflamed tonsils. [NAME REDACTED] experienced headaches and nausea.

The air conditioning unit in room 209H was cleaned on Monday, October 7, 2002 by [NAME REDACTED] and another employee of University Housing. Inside of the unit, the drainage pipe for the condensation that builds up on the coils was clogged. The water intended for the reservoir was orange with growth. Water and condensation also dripped onto the air filter most likely causing additional growth which was masked by the unprecedented dust on the filter. A mildicide spray was applied to the unit. Maintenance also informed J Christopher that filters were to be changed every six months and that the filter should have been changed over the summer. It was apparent that the filter was at least a year old.

APPENDIX O

EXHIBIT F TO THE PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO SUSPEND DISCOVERY

LETTER

North Carolina
Department of Health and Human Services
Division of Public Health
Epidemiology Section
1912 Mail Service Center
Raleigh, North Carolina 27699-1912

January 23, 2004

Mr. J. Kamau Christopher
[North Carolina State University]
[jkchrist@unity.ncsu.edu]
243 Clinton Place
Newark, New Jersey 07112

Dear Mr. Christopher:

I am responding to your case study concerning mold at North Carolina State University. My response is on behalf of the Governor's Office and the Division of Public Health. Currently the Division of Public Health is the state agency designated to address health related mold issues in all state government buildings, including the university system.

The Division of Public Health, in cooperation with the State Construction Office, has implemented a program for responding to mold related concerns in specific state owned or leased buildings. A key aspect of the program is to work through the safety and health office of the agency or university whenever mold situations or complaints arise. Therefore, we will be working with the Environmental Health and Public Safety Center at North Carolina State University concerning your case study. I encourage you to contact the Center directly. The person to contact is David Rainer at 515-4238.

Please feel free to contact me directly at (919) 733-0200 if I can be of further assistance.

Sincerely,
/s/ PAT CURRAN
Pat Curran, CIH
Manager
Health Hazards Control Unit

cc: David Rainer
darainer@qw.fis.ncsu.edu

APPENDIX P

EXCERPTS FROM EXHIBITS 17 AND 28 TO THE PLAINTIFF-APPELLANT-PETITIONER'S MOTION FOR TEMPORARY STAY, MOTION TO AMEND THE RECORD AND MOTION TO EXPEDITE THIS APPEAL

LETTER

North Carolina State University
Office of Finance and Business
Holladay Hall
Campus Post Office Box 7201
Raleigh, North Carolina 27695-7201

July 24, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
P.O. Box 2688
Wilson, North Carolina 27894-2688

Subject: Public Information Requests for the Government of the State of North Carolina and Government of the United States of America

Dear Sir:

Per your request, North Carolina State University is providing the following information: (i) The North Carolina State University Facility Profile and Ten-Year Capital Plan; (ii) Report on Residence

Hall Inspection for mold[, dated] January 2004 (attached); (iii) NC State had several projects involving Wood Residence Hall over the past several years. It is not clear which project you are referencing. Below is a list of the projects for Wood Residence Hall. Please indicate which one you are referring to: Wood Residence Hall HVAC Controls Installation; Wood Residence Hall Roof Replacement; Wood Residence Hall A&B Stairwell Repairs; Wood, Turlington, Alexander, Gold, Syme & Welch – Comprehensive Renovations

Sincerely,
/s/ CHARLES D. LEFFLER
Charles D. Leffler
Vice Chancellor for Finance and Business

CDL/leb

Attachment

MEMORANDUM

North Carolina State University
Environmental Health & Safety Center
Campus Post Office Box 8007
Raleigh, North Carolina 27695-8007

[January, 2004]

To: Gary Thompson, Asst. Director, Facilities Operations – Residence Life
From: Bruce L. MacDonald, Health & Safety Manager
Re: Residence Hall Inspection for Mold

On January 5, 2004, we inspected a number of Residence Life rooms that reported having a "mold" problem some time during the past year. The list of areas inspected and the results of our findings is attached in an Excel spreadsheet. Also, I have attached pictures of areas that did show signs of mold growing.

Overall, I did not see that there are any major "mold" issues in the areas we visited. Residence Life maintenance staff appears to be very responsive to complaints submitted by the resident when the resident felt there was an issue with mold.

Most areas that had previous complaints were free of any visible mold. In some cases, we had a difficult time determining "mold growing every where" when the room had no source of moisture and no signs that mold was growing. Since the students are on vacation[,] we could not ask them what they perceived was "mold" in their room.

There are some buildings that I felt will be a continuing challenge since little can be done to control humidity and temperature in the rooms. One such area is the Avent Ferry complex. There are many rooms where the outside air can penetrate into the room bringing in the high humidity from outside on hot, humid days. The walls are cinder block construction. The students tend to keep the room temperature below 70 [degrees Fahrenheit]. The combination of high humidity and low temperatures results in moisture on the walls. This is an ideal situation for mold to grow.

It is my understanding that whenever a student calls in about mold[,] your staff is quick to respond in cleaning up the site. Fast response minimizes the spread of the mold.

Another area where mold is growing that will be difficult to control is in the shower area. The ventilation in the bathroom is minimal to control the humidity built up from individuals [showering]. The best that can be done is to continue to clean these areas as mold is identified.

Two areas were identified with moisture underneath the floor tile. In one case, a shower had leaked and water infiltrated the corner of the room. The shower leak was fixed stopping any further water infiltration.

The other area with moisture below the floor tile is a result of water infiltrating a corner of the room near the windows. The water is infiltrating because of structural issues with the outside façade.

Water underneath the tile will not cause a mold issue but will eventually lift the tiles off of the floor and will need to be replaced.

Ceiling tile that has water stains or has mold growing as noted on the spreadsheet need to be replaced. Efforts should be made to resolve the water leaking from the riser valve in Carroll.

As a side note[,] I want to point out that there is little evidence that supports a cause and effect relationship between the presence of mold and adverse health effects. More controlled studies are needed before we know if any relationship does exist.

In conclusion, I do not see any evidence that there is a significant mold issue in the Residence Halls. Where I did see mold where I would have expected - in the shower area. The response by your staff is prompt to clean up, replace or repair suspected mold issues which quickly mitigates any potential issues escalating.

If you would like me to tour the Residence Halls again in the spring or early summer[,] let me know. It may be helpful to see what happens when we have high humid days.

APPENDIX Q

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

August 15, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

RE: your August 7 and 11 letters to Charles Leffler

Dear Mr. Bey:

Yesterday[,] Kevin MacNaughton brought me copies of your August 7 and August 11 letters to Charles Leffler, and asked me about response. As the Associate Vice Chancellor for Facilities, Mr. MacNaughton is responding to your request for records on facilities at NC State – his latest response should be mailed out next week. However, your "Request Item Number Ten" involves records that are not in his custody. That is why they have not provided a response to those records. Most records that fall under Request Item Number Ten are not in my custody either, but I've agreed to coordinate a

reasonable response. . . . Let me suggest that we seek some reasonable and practical limits on what appears to be an overly broad request. . . . I do have records in my custody that relate to your failed tort claim against NC State. . . . Finally, please address any future records request to me, and specify which office you want the records from. I'll forward the request to that office and advise them on their obligations with respect to responding.

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

LETTER

North Carolina State University
Office of Finance and Business
Division of Facilities
Holladay Hall
Campus Post Office Box 7232
Raleigh, North Carolina 27695-7232

August 18, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
P.O. Box 2688
Wilson, North Carolina 27894-2688

Subject: Public Information Requests for the Government of the State of North Carolina and Government of the United States of America

Dear Sir:

This is a response to both your August 7, 2008 and follow-up August 11, 2008 letters address[ed] to Vice Chancellor Leffler. A copy of the inspection and investigative reports you have requested related to Wood Hall and the Facility Profile are attached [Capital Equity/Adequacy Study Online Questionnaire . . . Total Building Data Cost Summary for Facility Deficiency Correction: $1,430,463.00]. Wood Hall does not appear as a project in the Facility Profile because the ratio of deficiencies to the building value fell below the

threshold (35%) established for inclusion in a Facility Profile. The funds used to address deferred maintenance in residence halls at NC State come from housing receipts and therefore this work was not included in the capital funding allocations proposed and approved as part of the 2000 Higher Education Bond program.

There are no other reports related to investigations of mold in Wood Hall.

The construction start and completion dates associated with the projects listed in my previous response are as follows: Wood Residence Hall Roof Replacement: 5/20/2002 – 7/31/2002; Wood Residence Hall HVAC Controls Installation: 4/1/2003 – 7/30/2003; Wood [Residence Hall] Comprehensive Renovations: 1/10/2006 – 10/29/2007; Wood Residence Hall A&B Stairwell Repairs: 6/2/2008-8/5/2008

There is not an existing assembled list of associated documentation related to these projects.

Sincerely,
/s/ KEVIN MACNAUGHTON
Kevin MacNaughton
Associate Vice Chancellor for Facilities

APPENDIX R

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 2, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . [R]ecords . . . from . . . Student Conduct, Student Health Services, Registration & Records, and Human Resources . . . are enclosed. . . . [T]he University of North Carolina General Administration is the custodian of the "Facility Profile and Ten-Year Capital Plan" documentation. . . . [A] rough estimate of the papers associated with that student is 9,000 pages . . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 3, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . Facilities staff reports that Wood [R]esidence [H]all renovation records are part of a multi-hall renovation project . . . [with an] [e]stimated volume . . . [of] about 16,000 pages . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

APPENDIX S

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 24, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . The voluminous Facility Profile and Renovation Project documents that you want to view onsite are not at NC State. You may contact Terry Feravich, the UNC General Administration Associate Vice President for Finance and University Property Officer, regarding that request. . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

LETTER

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

September 30, 2008

Mr. J. Christopher Bey
c/o Sharon Bey-Christopher, Esq.
Managing Attorney
Legal Aid of North Carolina, Inc.
108 Gold Street, East
P.O. Box 2688
Wilson, North Carolina 27894-2688

Dear Mr. Bey:

. . . [The documents requested from] University Housing [are] enclosed . . . .

Sincerely,
/s/ DAVID T. DROOZ
David T. Drooz
Senior Associate General Counsel

ELECTRONIC MAIL CORRESPONDENCE

September 17, 2003, 11:58AM

From: Tim Luckadoo
To: Nancy Jenkins, and Tom Stafford
CC: Gary Thompson, Susan Grant, and Tim Blair
Subject: Wood Hall

Here is what we know so far: [NAME REDACTED] submitted a work request late afternoon on August 25 related to mold in his room. The next day, August 26, two maintenance staff went to the room, cleaned the AC unit and performed other standard maintenance on that unit. On August 28, [NAME REDACTED] brought a doctor's note to the RD related to his respiratory irritation. We sent maintenance staff member[s] back to the room to look for any signs of mold, etc., but none were found.

Since move-in, we have had four complaints related to mold in Wood Hall. All have been resolved.

The filters in all residence halls are changed four times per year. The Wood filters were changed in June and are scheduled to be changed at the end of September. This meets or exceeds the manufacturers recommendations. When we change filters, we also check the units and place [a] tablet in the drip pan to retard the growth of algae, etc.

Tim Blair will contact [NAME REDACTED] today to discuss his concerns, and will contact the reporter to correct factual inaccuracies with the story. I will let you know what else we find. Thanks[,] Tim

ELECTRONIC MAIL CORRESPONDENCE

September 17, 2003, 12:25PM

From: Gary Thompson
To: Susan Grant, Tim Blair, and Tim Luckadoo
Subject: FYI

FYI: After looking at the Technician photo, we . . . believe that what is shown reflects typical condition of corrosion, dust, dirt, discoloration, and yes, some mold that is not uncommon in units that are 20+ years old. We have no faith that any maintenance was done to the units for the first 10 years. This is not to say that we are now neglecting the maintenance for we are in and around these units on a very frequent basis all year round. We do have a system that includes vacuuming the units when we change filters. We have discontinued the use of chemical spray as a typical maintenance protocol due to the sensitivity of our students an chemical reactions. We have proposed and obtained pricing on replacing the original fan coil units, however the project was placed at a lower priority for the sake of other projects. In addition, we have a price of . . . [about] $50,000 to replace both chiller units with a new unit should we want to pursue that avenue. What else do we need? GT.

LETTER

North Carolina State University
University Housing and Greek Life
Campus Post Office Box 7312
Raleigh, North Carolina 27695-7315

December 18, 2003

North Carolina Department of Labor
Division of Occupational Safety & Health
1101 Mail Service Center
Raleigh, North Carolina 276911-1101

Attn: Ron Wells

Re: OSH Complaint 204760730

Dear Mr. Wells:

This is in reference to your letter of December 18, 2003, regarding a report of possible health and/or safety hazards in our work environment. Specifically, the alleged violation relates to uncorrected mold and mildew growth in the residence halls causing health problems for employees and students.

I have attached a document that describes our mold prevention and response protocols. We work closely with the University Environmental Health and Safety Department, as well as University Facilities Operations to provide ongoing inspections and preventative maintenance for our facilities. Our facilities maintenance mechanics and housekeeping services respond to any reported complaints.

In October of 2002, a Wood Hall Resident Advisor submitted a written report to his supervisor requesting that room heating and air-conditioning units be serviced due to his concerns about possible mold in that building. All units were serviced shortly thereafter. In September of 2003, this Resident Advisor complained that there was mold in his residence hall room. He had not reported any mold concerns in August when he moved into his room. His room was cleaned, the heating and air-conditioning unit was serviced, and there have been no further complaints.

I hope this information will be sufficient. . . .

Sincerely,
/s/ TIMOTHY R. LUCKADOO
Timothy R. Luckadoo, Ph.D.
Associate Vice Chancellor for Student Affairs and
Director of University Housing

LETTER

North Carolina Department of Labor
Division of Occupational Safety and Health
Raleigh Field Office
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

July 20, 2004

Timothy R. Luckadoo, Ph.D.
North Carolina State University
Univesity Housing
1112 Pullen Hall
Raleigh, North Carolina 27695

Re: OSH Complaint 204760730

Dear Mr. Luckadoo

. . . Based on the information you have provided, OSHNC feels the case can be closed on the grounds that the alleged hazardous conditions have been corrected or no longer exist. . . .

Sincerely,
/s/ ANITA HENDERSON
For Ron Wells,
Safety and Health Compliance Supervisor

MEMORANDUM

North Carolina State University
Office of Legal Affairs
Campus Post Office Box 7008
Raleigh, North Carolina 27695-7008

To: Tim Luckadoo, Tim Blair, David Rainer, and Bruce MacDonald
From: David Drooz
Date: June 9, 2006
Re: [T]ort claim related to mold in Housing

Attached is the first set of discovery requests from the plaintiff in this case. Please draft responses to the extent you have the information, and sent them to me electronically. Please share with anyone else at NC State who may have the information (Gary Thompson? Others?).

The deadline for the response has been extended by the Industrial Commission to June 30. I'll need your draft responses by June 23 at the latest so there is time to discuss them, and so the Attorney General will have time to discuss them as well.

A lot of questions and requests for production of documents are overbroad, irrelevant, or abusive. Please do not waste your time trying to respond where it makes no sense in the context of a claim that mold in Wood Hall impairs his health. For instance, I don't think information about other buildings at NC State is pertinent. . . .

I have asked the Attorney General's Tort Claim section to (1) let us know what questions/requests we do not need to answer, and (2) file a motion to dismiss on the grounds that [the

Plaintiff] was an employee at the time so his exclusive remedy should have been a Workers Comp[ensation] claim, not a tort claim. I don't know if that will be a viable motion[,] but the Attorney General's office said they would consider doing it.

cc: Deborah Harvey
Dahr Joseph Tanoury, Asst. Attorney General

ATTACHMENT

[Draft Response to Plaintiff's First Set of] Interrogatories [and Request for Production of Documents]

. . . [INTERROGATORY:] Describe fully and completely the renovations planned for Wood Hall, identify and state any and all contractors and architects with contractual agreements with North Carolina State University to renovate said building, and explain fully the reason for allowing students to remain in said building before and during renovations after the press release announcing said renovations. ANSWER: Renovation to Wood Hall (May 2006 – August 2007) [will include] installation of sprinkler system, replacement of individual fan coil units [in the HVAC system], and installation of make-up air [system as part of the HVAC system] to comply with code changes since Wood Hall was built. [The] Architect [is] Stanford White Associates [and the] [c]ontractor [is] Centex. [The] [b]uilding[s] will be renovated in two stages. In stage one, the [one] building will be renovated from May 2006 [to] December 2006. The [other] building will house conference groups during the summer and will house students during the fall 2006 semester. In December, students will be moved from the . . . building [still requiring renovations] to the newly renovated . . . building. Renovation will then begin in the . . . building [still requiring renovations] and will be completed prior to the start of the fall 2007 academic semester. Since [the] buildings are separate [and free standing], we are able to keep

renovation activities confined to one building while students are residing in the other. . .

[INTERROGATORY:] Describe fully and completely the sequence of events that has let to the announced renovation of Wood Hall in the fall of 2006 and spring 2007, while also identifying each person involved in the process and evaluation of said facilities, and identify and describe fully and completely any and all reports, records, documents, memoranda, and files produced, created, maintained and/or discarded relative to this matter. ANSWER: The renovation has been part of the University Housing 10-year Facilities [P]lan. The installation of the sprinkler system is per the State mandate [requiring that] . . . all residence hall[s] [have sprinkler systems]. The replacement of the fan coil units is related to the 20-year life cycle of the units. The introduction of the make-up air system is required due to current state codes. Individuals involved in the development of the University Housing 10-year Facilities Plan include: Susan Grant, Director[,] Gary Thompson, Associate Director for Finance[,] Pete Burke, Associate Director for Finance[,] Jim Pappenhagen, Associate Director for Administration[,] Gay Perez, Associate Director for University Apartments (formerly Associate Director for West Campus)[,] Kathleen Ruppe, Associate Director for Central Campus[,] Tim Blair, Associate Director for East Campus[,] Hany Younes, Associate Director for Graduate and Family Housing (retired). . . .